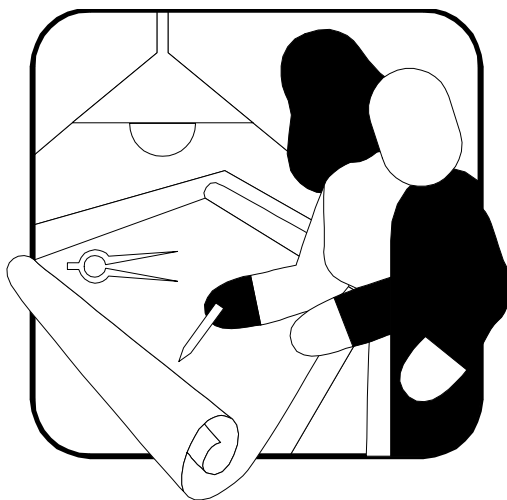




**US Army Corps
of Engineers.**

**EP 715-1-7
31 July 2002**

ARCHITECT-ENGINEER CONTRACTING



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Procurement
ARCHITECT-ENGINEER CONTRACTING

1. Purpose.

a. This pamphlet provides guidance and procedures for contracting for architect-engineer (A-E) services in accordance with the Brooks Architect-Engineer Act and the acquisition regulations referenced below. The guidance and procedures in this pamphlet are intended to promote fair, efficient and consistent A-E contracting practices throughout the U.S. Army Corps of Engineers (USACE).

b. Adherence to the guidance and procedures herein will ensure proper compliance with the acquisition regulations, and any variations therefrom must be documented in the contract file (provided the variations do not violate the acquisition regulations).

c. This pamphlet provides guidance and procedures for implementing certain key portions of the acquisition regulations relevant to A-E contracting. However, it is not intended to cover all aspects of the A-E contracting process and should not be used as a substitute for the current acquisition regulations (the FAR system) which provide procurement policy. If a conflict arises between this pamphlet and the acquisition regulations, the acquisition regulations govern.

2. Applicability. This pamphlet applies to all USACE commands authorized to procure A-E services, and to all USACE programs.

3. Distribution Statement. Approved for public release. Distribution is unlimited.

4. References.

a. Brooks Architect-Engineer Act; Public Law 92-582, as amended; 40 United States Code (U.S.C.) 541-544 (Appendix A).

b. Federal Acquisition Regulation (FAR) and the Defense (DFARS), Army (AFARS) and Corps of Engineers (EFARS) supplements thereto.

c. Army Regulation (AR) 25-55, The Department of the Army Freedom of Information Act Program.


d. AR 215-4, Nonappropriated Fund Contracting.

- e. Engineer Regulation (ER) 5-1-11, U.S. Army Corps of Engineers Business Process.
- f. ER 1105-2-100, Planning Guidance Notebook.
- g. ER 1110-1-12, Engineering and Design Quality Management.
- h. ER 1110-1-8152, Professional Registration.
- i. ER 1180-1-9, Design-Build Contracting.
- j. Engineer Pamphlet (EP) 715-1-4, Architect-Engineer Contracts: Competing for Architect-Engineer Contracts Awarded by the U.S. Army Corps of Engineers.
- k. Engineer Manual (EM) 1110-1-1000, Photogrammetric Mapping.

5. Acronyms. Appendix B contains a list of acronyms used in this pamphlet.

FOR THE COMMANDER:

31 Appendices
(See Table of Contents)


JOSEPH SCHROEDEL
Colonel, Corps of Engineers
Chief of Staff

Procurement
ARCHITECT-ENGINEER CONTRACTING

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CHAPTER 1 INTRODUCTION

1-1. Scope. This pamphlet is generally applicable to all types of A-E contracts. However, certain aspects of Chapter 4 on price negotiation and Chapter 5 on contract administration are not relevant to cost-reimbursement (CR) contracts. See FAR 15.4, 16.3, 16.4, 31, 32 and 42 for specific guidance on CR contracts.

1-2. Background. The Brooks A-E Act (Appendix A) defines A-E services and specifies the Federal policy for procuring A-E services. The Brooks A-E Act requires the public announcement of requirements for A-E services, selection of the most highly qualified firms based on demonstrated competence and professional qualifications, and the negotiation of a fair and reasonable price. FAR Part 36, and the supplements thereto, implement the Brooks A-E Act.

1-3. Responsibilities.

a. Commanders should regularly evaluate the A-E contracting process in their command to ensure it is efficient and effective. Appendices C, D and E are checklists that may be used for this purpose.

b. The Principal Assistant Responsible for Contracting (PARC), Headquarters USACE (HQUSACE) (CEPR-ZA):

(1) Is the senior staff official responsible for execution, oversight and administration of the contracting function.

(2) Carries out delegable authorities of the Head of the Contracting Authority as described in the FAR, DFARS, AFARS and EFARS.

c. The Technical Policy Branch, Engineering and Construction Division, Directorate of Civil Works, HQUSACE (CECW-ET):

(1) Is responsible for USACE technical guidance and procedures for A-E contracting, including maintenance of this pamphlet. CECW-ET, in coordination with the PARC and other HQUSACE elements, will identify and implement regulatory and procedural changes to improve the A-E contracting process throughout USACE.

(2) Supports the PARC in monitoring the compliance of USACE commands with A-E procurement regulations and this pamphlet through staff assistance visits, automated and special reports, informal coordination, conferences and other appropriate methods.

d. The Technology Integration Branch, Engineering and Construction Division, Directorate of Civil Works, HQUSACE (CECW-EE) is the proponent of the Architect-Engineer Contract Administration Support System (ACASS) and is responsible for ACASS policy and general management oversight. This office is also the principal interface on ACASS with other Federal agencies.

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e. The Contracting Division, Portland District (CENWP-CT) is responsible for operation and maintenance of ACASS in accordance with HQUSACE policy and direction. CENWP-CT will issue instructions on ACASS and respond to inquiries from users and A-E firms.

1-4. Training. The following courses provide valuable training regarding A-E contracting.

a. "Architect-Engineer Contracting," USACE Proponent Sponsored Engineer Corps Training (PROSPECT) Course Number 004.

b. "Architect-Engineer Contracting," Defense Acquisition University (DAU) Course Number CON 243.

1-5. Internet Addresses. Appendix F is a list of useful Internet addresses pertinent to A-E contracting, and contracting in general.

CHAPTER 2

ACQUISITION PLANNING

2-1. Principles.

a. Proposed contracts for A-E services will be structured to maximize competition, provide contract opportunities for many firms, and maximize small business (SB) and small disadvantaged business (SDB) participation, while satisfying the needs of the Government in the most effective, economical, and timely manner.

b. Acquisition planning for A-E services will be accomplished by the project delivery team (PDT) under the leadership of the project manager (PM), and will include team members from engineering, construction, contracting, and other appropriate personnel, as well as the Deputy for Small Business (DSB).

2-2. Responsibilities.

a. General. The Deputy District Engineer for Program and Project Management (DPM), the Chief of Engineering¹, the Chief of Contracting, the DSB, and the chiefs of other functional elements as appropriate, in each operating command (center, district or laboratory) having A-E contracting authority are responsible for acquisition planning for A-E services.

b. Time Standards. Commanders should regularly review the A-E contracting process in their command to ensure that A-E contracts and task orders (issued under indefinite-delivery (ID) contracts) are procured in accordance with the time standards in paragraph 2-11 to the maximum extent possible.

2-3. Definition of A-E Services.

a. General. A-E services are defined in FAR 36.102 and 36.601-4. Appendix G provides guidance to assist the contracting officer (KO) in determining if a particular contract should be procured as A-E services in accordance with FAR Subpart 36.6. Appendix H provides further guidance on which types of environmental services should typically be procured as A-E services. Appendix I provides specific guidance on the procurement of surveying, mapping and geospatial services.

b. Design-Build and TERC. A design-build contract is procured as a construction contract in accordance with FAR Part 36, and not as an A-E contract, since the A-E services are a minor part of a design-build contract. Similarly, a Total Environmental Restoration

¹ Engineering Division and Chief of Engineering (or Chief, Engineering Division) is used generically in this EP to refer to the division and its chief responsible for the engineering function at a district or center. Likewise for Construction Division and Chief of Construction (or Chief, Construction Division).

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Contract (TERC) is procured as a service contract under the source selection procedures in FAR 15.3, and not as an A-E contract, since the A-E services are a minor part of a TERC contract.

2-4. North American Industry Classification System (NAICS). The NAICS classifies various businesses and industries. The Small Business Administration (SBA) establishes a small business size standard for each NAICS code. Work principally defined by the following NAICS must be procured as A-E services.

Industry	NAICS Code	Small Business Size Standard
Architectural Services	541310	\$4.0 M
Landscape Architectural Services	541320	\$5.0 M
Engineering Services (procured under Brooks A-E Act)	541330	\$4.0 M
Geophysical Surveying and Mapping Services	541360	\$4.0 M
Surveying and Mapping (except Geophysical) Services, and Mapmaking	541370	\$4.0 M
Interior Design Services	541410	\$5.0 M
Environmental Consulting Services (except Environmental Engineering Services under 541330)	541620	\$5.0 M

2-5. General Considerations. See FAR Part 7 and the supplements thereto for general requirements for acquisition planning, and EFARS 16.501 for specific requirements for ID contracts. Thorough acquisition planning (informal or formal) will determine the nature, type, scope and number of contracts required for a project or program, including contracts for A-E services. Acquisition planning will consider the nature, complexity and dollar value of the anticipated work; schedule and urgency; budget and funding stream; industry capabilities; and small business opportunities. Unrelated or dissimilar work shall not be bundled in the same contract.

2-6. Small Business Considerations. See Appendix J for a discussion of the small business considerations for A-E contracts. As required by EFARS 19.201(c)(9)(B), each proposed synopsis for A-E services shall be coordinated with the DSB. The DSB will review the acquisition for possible set-aside for SB, emerging SB (ESB), Historically Underutilized Business Zone (HUBZone) SB or the SBA 8a Program, in accordance with current laws and regulations. The DSB will document the review using DD Form 2579. If a contract is not set-aside, it will still be structured to maximize the opportunities for SB and SDB to compete. For example: unrelated requirements will not be bundled into one contract; the scope and geographic area of an ID contract will not be unduly broad; the monetary limits of an ID contract will be set at the lowest reasonable levels; and overly restrictive technical requirements will not be included.

2-7. Acquisition Plans. Appropriate acquisition planning must be performed for each A-E contract and task order. An informal acquisition plan is suitable for most contracts (see EFARS 7.102(S-103)). The requirements for formal acquisition plans are contained in DFARS 207.103, AFARS 5107.103 and EFARS 7.102 and 7.103. A formal acquisition plan

must follow the format in FAR 7.105 and be approved by the PARC. Acquisition plans must be fully coordinated among the concerned functional elements. Acquisition planning for a construction project must include both the design and construction phases, and be performed prior to the solicitation of an A-E contract, in order to allow the consideration of design-bid-build, design-build (see ER 1180-1-9) and other delivery methods.

2-8. Contract Types.

a. General. The KO is responsible for selecting the appropriate contract type in coordination with technical, contracting and legal specialists. FAR Subpart 16.1 provides general policies and guidance on selecting contract type.

b. Firm-Fixed-Price (FFP) Contract. A FFP contract (FAR 16.202) is appropriate when the statement of work (SOW) can be well defined and there is sufficient time to announce, select, negotiate and award a contract. A FFP contract minimizes the Government's risk and administrative burden. Other types of fixed-price (FP) contracts may be appropriate at times (see FAR 16.2).

c. Cost-Reimbursement Contract. A CR contract (FAR 16.3) is used when uncertainties in the SOW do not permit the costs of performance to be estimated with sufficient accuracy to use a FP contract. A CR contract shall not be used as a substitute for developing a detailed SOW or allowing adequate procurement lead-time. The most common CR contract types used for A-E services in USACE are cost-plus-award-fee (CPAF; FAR 16.305) where the contractor's fee (same as profit in a FP contract) is dependent on certain performance criteria, and cost-plus-fixed-fee (CPFF; FAR 16.306) where the contractor receives a fixed fee, independent of actual costs.

d. Labor-Hour (LH) Contracts. A LH contract or task order (FAR 16.601 and 16.602) compensates the contractor for actual hours worked at predetermined rates. This contract type does not provide a financial incentive for a contractor to perform efficiently, and hence, is one of the least preferred contract types. Somewhat similar to a CR contract, a LH contract may be applicable when the extent or duration of work or anticipated costs can not be estimated with any reasonable degree of confidence. A LH contract or task order might be appropriate for work such as dredging payment surveys where the duration of the survey work is dependent on the progress of the dredging contractor and is not within the direct control of the survey contractor.

e. Indefinite-Delivery Contracts. ID contracts are the predominant contract type used for A-E services in USACE. ID contracts must comply with FAR 16.5, and EFARS 16.5 and 36.601-3-90. ID contracts are generally used for recurring types of A-E services where procurement of these services individually by normal announcement, selection, negotiation and award procedures would not be economical or timely. Task orders for particular projects are negotiated and issued under the terms and conditions of the ID contract. Task order may be FP, CR or LH, as allowed by the ID contract.

f. **Letter Contracts.** A letter contract (FAR 16.603) is a preliminary contractual instrument that authorizes a contractor to begin work immediately. A definitive contract must then be negotiated within the time periods prescribed in FAR 16.603-2. It is appropriate for urgent requirements when there is not sufficient time to follow the normal A-E negotiation and award process. The use of a letter contract must be approved by CEPR-ZA in accordance with FAR 16.603-3 and DFARS 216.603-3 and 217.74, except USACE Division Commanders can approve letter contracts not exceeding \$3,000,000 for emergencies in accordance with EFARS 16.603-3 and 17.7404-1 (S-100).

g. **Simplified Acquisition Procedures.**

(1) **Purchase Orders.** Purchase orders (FAR 13.302) are an expedient method for purchasing services that do not exceed the simplified acquisition threshold (SAT), which is currently \$100,000 (FAR 2.101). Announcement and selection procedures are described in paragraph 3-15.a. Purchase orders are almost always negotiated as FFP.

(2) **Purchase Card.** A-E services that do not exceed the micro-purchase threshold of \$2,500 may be procured using the Government purchase card as described in paragraph 3-15.a(4).

2-9. **Selection of Contract Type.** Selection of the appropriate A-E contract type generally depends on the following factors (also see FAR 16.104):

a. **Scope Certainty.** Use a FFP contract, task order, or purchase order if the scope can be defined and the level of effort reasonably estimated. If not, use a CR contract or task order. As a last resort, use a LH contract or task order.

b. **Nature and Size of Work.** Consider first a task order if the required services are within the scope and size limitations of an available ID contract. Or, consider using a contract awarded through the advance selection process (see paragraph 3-15.h) if the required services are within the type of work and size limitations of that selection. If neither of these methods are suitable, initiate a new announcement and selection process.

c. **Schedule.** A separate contract should be procured for a moderate or large project whenever possible. Consider use of a purchase card or purchase order for a very small project. Consider a task order for a time-sensitive, small or moderate size project. Consider using a contract awarded through the advance selection process for a time-sensitive project of the appropriate type and size. Consider limited competition (FAR 6.3) and/or a letter contract in the most urgent circumstances.

2-10. **A-E Contracting Process.** Appendix K is a generic network of the A-E contracting process in USACE based on the pertinent acquisition regulations.

2-11. **Time Standards.**

a. General. Prompt procurement of A-E services is essential to properly serve USACE customers. Prolonged contracting causes delays in project milestones, untimely obligation of funds, increased costs and is unfair to A-E firms. For these reasons, realistic time standards have been established for awarding A-E contracts and issuing A-E task orders in USACE. These standards should be followed to the maximum extent possible.

b. Standards.

(1) Contracts should typically be awarded within 145 calendar days, measured from the date of the public announcement. The typical durations of the activities required to award an A-E contract are shown in Appendix L.

(2) Task orders should typically be issued within 37 calendar days, measured from issue of the Request for Price Proposal (RFPP) to the appropriate ID contractor. The typical durations of the activities required to issue a task order under an ID contract are shown in Appendix L.

(3) Task orders for outside customers, such as Army installations, where the scope preparation and negotiations were done by the customer, should typically be issued by USACE in 6 calendar days, measured from receipt of proper negotiation documentation and funding from the customer. The relevant contracting activities and durations are shown in Appendix L.

(4) Contracts and task orders should be awarded in less time if needed to meet critical customer requirements. Similarly, longer durations may be appropriate for certain contracts and task orders, such as ID contracts for USACE use or for complex and/or very large contracts and task orders.

c. Justifiable Delays. The above standards exclude justifiable delays beyond the reasonable control of a USACE command, such as: scope uncertainties, delay in receiving funds, deferral or suspension of a project by a customer or higher authority, unsuccessful negotiations with the highest qualified firm, delaying the award of an ID contract for a reasonable period to coincide with issuance of the first task order, or a protest. Also, additional time would be required if an audit is considered necessary to determine a fair and reasonable price.

2-12. Streamlining Techniques. Appendix M provides some suggested techniques for streamlining A-E contracting. The timely award of A-E contracts and task orders is largely within the direct control of each USACE command, and requires very close cooperation and teamwork among engineering, project management, contracting, counsel, resource management, small business, audit and other functional elements.

CHAPTER 3

ANNOUNCEMENT AND SELECTION

3-1. Principles.

a. Public announcements for A-E services will reflect the minimum needs of the Government, not arbitrarily restrict eligible firms, and describe the work required and selection criteria in sufficient detail to facilitate a meaningful selection of the most highly qualified firm.

b. Public announcements for A-E services will be fully coordinated among all pertinent functional staff elements.

c. A-E selections will be conducted in a fair, rational and consistent manner, in strict accordance with the announced selection criteria, and in compliance with FAR 36.602 and its supplements.

d. A-E firms will be promptly notified of their selection status and offered a meaningful debriefing on the evaluation of their qualification submission.

3-2. General. The guidance and procedures in paragraphs 3-4 through 3-14 generally apply to all contracts for A-E services, except as otherwise noted in paragraph 3-15 for certain special cases.

3-3. Responsibilities.

a. The Chief of Engineering in each operating command is responsible for the A-E selection process, including the technical content of public announcements for A-E services (including those prepared by other functional elements), the conduct of A-E evaluation (preselection and selection) boards, participation by customers in evaluation boards, and liaison with the A-E community.

b. The Chief of Contracting in each operating command is responsible for the procurement-related content of public announcements for A-E services, and for general oversight of the A-E selection process to ensure regulatory compliance.

c. Commanders may appoint qualified professional personnel, by name and/or position, to:

(1) Serve as chairpersons and alternate chairpersons of A-E preselection and selection boards.

(2) Approve A-E selections consistent with delegated authorities (EFARS 36.602-4(a)).

d. Commanders may designate qualified professional personnel, by name and/or

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position, who are eligible to serve as members of A-E preselection and selection boards, as authorized by EFARS 36.602-2(a). Alternatively, commanders may establish appropriate qualifications for board members and delegate authority to the Chief of Engineering to designate specific personnel who satisfy those qualifications as board members.

e. Commanders of Major Subordinate Commands (MSC) are responsible for quality assurance of the A-E selection process in their subordinate districts. This can be done through the approval of selections for large or highly visible projects, evaluation of district standard operating procedures for selections, random review of completed selection reports, observing or participating in district selection boards, and/or other appropriate means.

3-4. Public Announcement.

a. Regulatory Requirements. In accordance with FAR 5.203(d), 5.205(d), and 36.601-1, all requirements for A-E services expected to exceed \$25,000 shall be publicized (synopsized) on the Federal Business Opportunities (FBO) website (<http://www.fedbizopps.gov>)¹, except when properly waived in accordance with FAR 5.202. A response period of at least 30 calendar days shall be allowed for contracts expected to exceed the SAT.

b. Authority to Synopsize. A synopsis for an A-E contract, which has the equivalent effect as a solicitation for other types of contracts, should not be issued unless the Government has a definite intention to award a contract. Proper authorization from higher authority or a customer and adequate funding should be received prior to synopsising. However, for high priority requirements, a synopsis may be issued prior to receiving formal authorization and/or funding when there is a high probability that the requirement will not be canceled and the synopsis indicates that funds are not presently available for the contract (AFARS 5101.602-2(a)(ii)).

c. Format. Instructions and the format for preparing synopses are given in FAR 5.207 and DFARS 205.207. Appendix N provides supplemental instructions for USACE synopses for A-E services. Appendix O is an example synopsis for a FFP contract. Appendix P is an example synopsis for an ID contract.

d. Content. A synopsis will describe the contract, project and required services, selection criteria, and submission instructions. The synopsis will describe the specific work required in sufficient detail to facilitate a meaningful selection of the most highly qualified firm. (See paragraph 3-1.a.) The relative importance of all selection criteria must be clearly stated. Do not include criteria that are not directly related to project requirements or that unnecessarily restrict competition, such as:

- (1) specifying the minimum number of personnel in a firm;

¹ The FBO website is also called the Governmentwide point of entry (GPE). USACE contracting offices are required to post public announcements on the Army Single Face to Industry (ASFI) website (<http://acquisition.army.mil>), which is in turn linked to the FBO website.

- (2) specifying non-essential or secondary disciplines;
- (3) specifying disciplines, capabilities or a percentage of work (except the prime firm in a small business set-aside) that must be performed "in-house";
- (4) requiring certification of personnel by a private organization²;
- (5) requiring metric design experience³;
- (6) restricting firms to a specific geographic area;
- (7) specifying how the services should be performed (instead, describe the needed end products);
- (8) requiring the submission of any cost-related data;
- (9) requiring the submission of excessive qualification information;
- (10) restricting a firm from being considered due to having another current contract with the same contracting office; or,
- (11) requiring a security clearance to be considered for selection (however, eligibility for a clearance, such as U.S. citizenship, may be required).

e. **Review and Transmittal.** A synopsis will be prepared by appropriate technical and contracting personnel, and be fully staffed, including the DSB (see paragraphs 2-6 and 3-1.b). Obtain legal review of a synopsis for a complex or unusual contract. If a formal acquisition plan or a waiver of standard ID contract limits is required, approval must be obtained prior to synopsis. Synopses will be transmitted to the GPE electronically as described in FAR 5.207.

f. **Contact with Firms.** Requests for clarification of a synopsis and/or for additional information will be carefully handled to avoid providing any information that would give, or appear to give, an advantage to a firm in submitting their qualifications. A synopsis will be amended if additional information was given to any one firm or if the synopsis is found to be defective, and the response date appropriately extended.

3-5. **ACASS.** ACASS is an automated database of A-E qualifications (blocks 1 - 10 of

² Certifications can still be considered when comparing personnel qualifications, in the same manner that advanced degrees, relevant training, experience and longevity with the firm are considered.

³ Metric design is still not a common practice in the U.S. commercial market.

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Standard Form (SF) 254, Architect-Engineer and Related Services Questionnaire), Department of Defense (DoD) A-E contract awards, and performance evaluations of A-E contractors. ACASS is the only authorized automated system for this A-E information in DoD. Appendix Q provides additional information on the background, regulatory authority, contents and use of ACASS. ACASS is part of the Contractor Appraisal Information Center (CAIC) maintained by the Portland District.

3-6. Board Membership. A-E evaluation boards should be constituted as follows based on the requirements in FAR 36.602-2(a) and EFARS 36.602-2(a).

a. General Requirements. The chairperson will appoint members with appropriate expertise from the approved list of eligible personnel, or who meet the qualifications for board members established by the commander. Each board must have at least three members. A majority of the members must be USACE personnel. Appropriately qualified technical personnel from the functional element requesting the services should be represented. Where practical, a representative from the cognizant Construction Division will participate on an evaluation board for an A-E contract for the design of a specific construction project. There is no regulatory restriction on a Government employee serving on an evaluation board for an A-E contract and later participating in the negotiation and/or administration of that contract. However, the KO may impose such restrictions if necessary to ensure the integrity of the system of checks and balances.

b. Member Qualifications. Evaluation boards will be composed of highly qualified professional employees having collective experience in architecture, engineering, construction, and acquisition, as well as the specific type of work being contracted. A board will consist primarily of architects, engineers and/or land surveyors, as appropriate for the type of work. However, personnel in other disciplines may be members to provide specialized expertise when needed. The chairperson will be a USACE Engineering Division employee, and be a registered or licensed engineer, architect or land surveyor, as appropriate for the type of work. Professional registration of other board members is encouraged. See Appendix I for guidance on board membership requirements for surveying and mapping contracts. All board members will comply with the procurement integrity requirements of FAR 3.104. Additional board membership requirements are:

(1) Preselection Board. A chairperson will be at least GS-13 or have equivalent technical experience, and have considerable experience on A-E evaluation boards. A majority of the members will have experience on A-E evaluation boards.

(2) Selection Board. A chairperson will be at least GS-14 or have equivalent technical experience, and have extensive experience on A-E evaluation boards. A majority of the members will have experience on A-E evaluation boards. A person may serve as a member on both the preselection and selection boards for the same contract.

(3) Partner/Customer Representative(s). In accordance with EFARS 36.602-2(a), Federal and non-Federal partners/customers will be invited to nominate qualified representatives as members of the A-E evaluation boards for their projects, when practical. Representative(s) shall be submitted to the respective evaluation board chairperson for

approval, and must meet the same qualifications as USACE personnel. Specifically, they must have the appropriate background to knowledgeably evaluate the experience and qualifications of A-E firms in the required type of work.

3-7. Selection Criteria.

a. Regulatory Requirements. FAR 36.602-1(a) and DFARS 236.602-1(a)(6) specify the general A-E selection criteria. DFARS 236.602-1(a)(6) emphasizes that "the primary factor in A-E selection is the determination of the most highly qualified firm," and that secondary factors should not be given greater significance than technical qualifications and past performance.

b. Specific Project Criteria. DFARS 236.602-1(a)(i) requires that a synopsis state the order of importance of the selection criteria and that the criteria be project specific. Specific project criteria should be stated in the context of the general FAR and DFARS criteria, as illustrated in Appendices O and P. Include only selection criteria that will be true discriminators in determining the most highly qualified firms.

c. Application of Selection Criteria. Boards will evaluate firms' qualifications strictly on the basis of the announced selection criteria and their stated order of importance. The criteria will be applied as follows:

(1) Primary Selection Criteria. The following criteria are primary and will be applied by a preselection board to determine the highly qualified firms and by a selection board to determine the most highly qualified firms. The primary criteria are listed in the order of importance which is usually most appropriate, however they may be ordered differently as warranted for specific contracts.

(a) Specialized Experience and Technical Competence (FAR 36.602-1(a)(2)). A board will evaluate the specialized experience on similar projects⁴ and the technical capabilities (such as design quality management procedures, CADD, equipment resources, and laboratory requirements) of the prime firm and any subcontractors. Evaluate, where appropriate, experience in energy conservation, pollution prevention, waste reduction, and the use of recovered materials. The effectiveness of the proposed project team (including management structure; coordination of disciplines, offices and/or subcontractors; and prior working relationships) will also be examined.

(b) Professional Qualifications (FAR 36.602-1(a)(1)). A board will evaluate, as appropriate, the education, training, registration, certifications (see paragraph 3-4.d(4)), overall and relevant experience, and longevity with the firm of the key management and technical personnel. This criterion is primarily concerned with the qualifications of the key

⁴ General experience working for certain customers, such as DoD, Army, Air Force or USACE, is not an appropriate selection criterion. Instead, the selection criteria should address experience in certain types of projects or work, and knowledge of essential laws, regulations and/or criteria.

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personnel and not the number of personnel, which is addressed under the capacity criterion. The lead designer in each discipline must be registered as required by FAR 36.609-4 and 52.236-25, but does not have to be registered in the particular state where the project is located.

(c) Past Performance (FAR 36.602-1(a)(4)). See Appendix R for guidance in considering past performance in A-E selections.

(d) Capacity (FAR 36.602-1(a)(3)).

- A board will consider a firm's experience with similar size projects and the available capacity of key disciplines when evaluating the capacity of a firm to perform the work in the required time. Consider the full potential value of any current ID contracts that a firm has been awarded when evaluating capacity.

- Since it may be difficult for a firm to accurately predict required staffing based on the information in a synopsis, a firm should not be disqualified or downgraded because of its proposed number of personnel for a project shown in Block 4 of the SF 255. Instead, a board should consider the total strength of the key disciplines in the prime firm and its consultants in the offices proposed to perform the work in relationship to the firms' current workloads.

(e) Knowledge of the Locality (FAR 36.602-1(a)(5)). Consider knowledge of the locality separately from geographic proximity, since the latter is a secondary criterion in accordance with DFARS 236.602-1(a)(6). (A firm may not be located close to a project but still be familiar with certain site conditions.) Examples include knowledge of geological features, climatic conditions or local construction methods that are unusual or unique.

(2) Secondary Selection Criteria. The secondary criteria will not be applied by a preselection board, and will only be used by a selection board as a "tie-breaker" (see paragraph 3-10.e), if necessary, in ranking the most highly qualified firms. The secondary criteria will not be commingled with the primary criteria in the evaluation system⁵. The secondary criteria are listed in the order of importance which are usually most appropriate for USACE contracts.

(a) SB and SDB Participation (DFARS 236.602-1(a)(6)(C)). The extent of participation of SB, SDB, historically black colleges and universities (HBCU), and minority institutions (MI) will be measured as a percentage of the total anticipated contract effort, regardless of whether the SB, SDB, HBCU or MI is a prime contractor, subcontractor, or joint venture partner; the greater the participation, the greater the consideration⁶.

⁵ If the criteria were commingled, a firm could be selected that was not the best qualified technically, but received high consideration on the secondary criteria. This outcome would be contrary to the intent of the Brooks A-E Act.

⁶ A subcontracting plan, in accordance with FAR 19.704 and 52.219-9, should not be requested from each firm that responds to a synopsis. This would be burdensome, as well as impractical

(b) Geographic Proximity (FAR 36.602-1(a)(5)). Proximity is simply the physical location of a firm⁷ in relation to the location of a project, and has very little to do with the technical ability of a firm to perform the project. Hence, proximity should normally only be used as a selection criterion for small or routine projects or ID contracts in support of a specific installation(s).

(c) Volume of DoD Contract Awards (DFARS 236.602-1(a)(6)(A)).

- DFARS states "do not reject the overall most highly qualified firm solely in the interest of equitable distribution of contracts." Hence, equitable distribution of DoD contracts must be treated as a secondary criterion. DoD A-E contract awards can be obtained from ACASS, and verified and updated during the interviews with the most highly qualified firms. The synopsis may also request firms to submit DoD contract award data in block 10 of the SF 255. Only consider awards of A-E contracts. Include awards to all branch offices of a company, except as indicated in DFARS 236.602-1(a)(6)(A)(2).

- For ID contracts, consider the total value of task orders actually issued by agencies in the last 12 months, and not the potential value of the contracts. For all types of contracts, do not consider options that have not been exercised.

3-8. General Procedures for Evaluation Boards.

a. Information Used by Boards. Boards will only consider the following information: SF 254, as submitted or from ACASS; SF 255, with any required supplemental information; documented performance evaluations, such as from ACASS; DoD contract award data; and the results of interviews of the most highly qualified firms. A board will not assume qualifications which are not clearly stated in a firm's submission or available from ACASS. A board will review the entire submission of each firm and not excerpts or summaries. A firm will not be contacted to clarify or supplement its submission, except during the interviews with the most highly qualified firms (see paragraph 3-10.d). Boards shall not consider any cost factors.

b. A-E Submissions.

(1) A-E submissions shall be handled by the Government in accordance with FAR

since the firms do not have a complete statement of work at this point. Prime A-E firms can, however, be asked to indicate the estimated percentage involvement of each SB and SDB firm on the team. A formal subcontracting plan is only required from the firm selected for negotiations.

⁷ When multiple offices of the prime firm and/or subcontractors will be involved in the performance of a project, consider the weighted distance from the project based on the relative amount of participation of each performing office.

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15.207 and 15.208, including the late proposal rules in FAR 15.208. A firm will not be considered if block 11 of its SF 255 is not signed, unless the SF 255 is accompanied with a signed cover letter or a current signed SF 254. If a firm does not submit a SF 254 with its SF 255, or have one on file in ACASS, it will not be considered (FAR 36.603(b)).

(2) Although firms are encouraged to update their SF 254 at least annually (FAR 36.603(d)(1)), older ones (up to 3 years old in accordance with FAR 36.603(d)(5)) must still be considered by a board. A firm may not be eliminated simply for failing to submit certain information or for altering the format of a SF 254 or SF 255. However, a firm may be recommended as not qualified or ranked low if missing, confusing, conflicting, obsolete or obscure information prevents a board from reasonably determining that a firm demonstrates certain required qualifications.

c. Small Business Status. If a contract has been set aside for small business in accordance with FAR 19.5, the preselection board must check that each prime firm has certified itself as a small business on the SF 254. The board must also be aware that there is a limitation on subcontracting whereby "at least 50% of the cost of contract performance incurred for personnel" must be expended for employees of the prime firm as required by FAR 19.508(e) and 52.219-14. Any questions will be referred to the DSB and the Contracting Division.

d. Evaluation Method. A board can use any qualitative method⁸, such as adjectival or color coding, to evaluate and compare the qualifications of the firms relevant to each selection criterion.

e. Reports. The documentation must reflect the final consensus of a board. If preliminary (such as prior to board discussions or interviews) or individual evaluations are included, the report must discuss how any significant differences among the evaluations were resolved. A board must retain documents and worksheets generated during its evaluation so that the evaluation is sufficiently documented and allows review of the merits of a potential bid protest. Failure to retain evaluation documents will leave the KO susceptible to the risk during bid protest of presenting a record with inadequate supporting rationale for the Comptroller General or court to find the selection decision reasonable. Handwritten worksheets are acceptable. The cover and each page of the report containing source selection information will be labeled "SOURCE SELECTION INFORMATION - SEE FAR 3.104" and be protected as required by FAR 3.104-5.

3-9. Preselection Board.

a. General. Preselection boards are permitted by FAR 36.602-2(a) and authorized by DFARS 236.602-2(a). Preselection boards may be advantageous when many firms respond to a synopsis, but generally the use of only a selection board is faster and less costly. The purpose of a preselection board is to determine which firms are highly qualified and have a reasonable chance of being considered as most highly qualified by the selection board (DFARS 236.602-2(a) and EFARS 36.602-2 (S-100)).

⁸ Numerical scoring is prohibited by AFARS 5115.304(b)(2)(iv).

b. **Determination of Highly Qualified Firms.** Each firm will be completely evaluated, even if a firm does not demonstrate certain required qualifications. A firm may be evaluated by only one member. However, all evaluations must be discussed by the entire board and a consensus reached on each firm. The firms which demonstrate better aggregate qualifications relevant to the primary selection criteria are considered highly qualified. A preselection board will not consider any secondary selection criteria. A preselection board will not be restricted to a specific or maximum number of firms for referral to a selection board.

c. **Report.** A preselection board report will be prepared similar to Appendix S. The report must clearly identify the specific weak or deficient qualifications of each firm not recommended as highly qualified. The report will be provided to the selection board and made a part of the selection board's report. Separate approval of a preselection report is not required.

3-10. Selection Board.

a. **General.** The functions of a selection board are described in FAR 36.602-3. A selection board evaluates the highly qualified firms identified by the preselection board and recommends at least three firms considered as most highly qualified, in order of preference. If a preselection board was not held, the initial phase of the selection board will be conducted and documented similar to a preselection board.

b. **Review of Preselection Report.** If a selection board considers the preselection board report inadequate, it will record the reasons and return the report to the preselection board for appropriate action. A selection board need not return the preselection report because it considers some of the firms to be less than highly qualified, provided a sufficient number of highly qualified firms remain.

c. **Determination of Most Highly Qualified Firms.** All members must personally evaluate the SFs 254 and 255 of all of the highly qualified firms. The firms which demonstrate higher aggregate qualifications relevant to the primary selection criteria are considered to be the most highly qualified firms. Secondary selection criteria will not be considered prior to the interviews in determining which firms are most highly qualified. At least three most highly qualified firms must be recommended⁹ if a single contract will be awarded. If more than one contract will be awarded from the same synopsis, sufficient firms must be recommended such that at least two most highly qualified firms remain "in reserve" when negotiations commence on the final contract.

d. **Interviews.**

⁹ If the selection board can not recommend at least three most highly qualified firms as required by the Brooks A-E Act, then the scope of the contract should be revised to increase competition and the contract synopsized again.

(1) Interviews (discussions) will be held with all of the most highly qualified firms as required by FAR 36.602-3(c). All firms will be interviewed by the same method (telephone, video teleconference or in person). For a routine project, at least one member will conduct the interview. For a major project, the majority of the members will conduct the interview. For a very significant project, presentations by the firms are recommended, which should be attended by all members. Firms will be given sufficient advance notice to allow responsible representatives to participate in the interviews or presentations.

(2) All firms will be asked similar questions about their experience, capabilities, capacity, organization, management, quality control procedures, and approach for the project, as appropriate. All questions must relate to the announced selection criteria. Information obtained from an interview that influenced the final ranking will be documented in the selection report.

e. Final Ranking of Most Highly Qualified Firms. After the interviews or presentations, a board will, by consensus, rank the most highly qualified firms in order of preference using the primary selection criteria. If two or more firms are technically equal, the secondary criteria will be used as "tie-breakers" and the final ranking of firms decided. Firms are technically equal when there is no meaningful difference in their aggregate qualifications relative to the primary criteria.

f. Report. A selection board report should be prepared in a format similar to Appendix T. The report must: clearly describe the reasons why each eliminated firm was less qualified than the most highly qualified firms, summarize the relative strengths of each most highly qualified firm with respect to the selection criteria, and clearly describe the rationale for the relative ranking of each firm.

3-11. Approval of Selections.

a. As permitted by DFARS 236.602-4(a), EFARS 36.602-4(a) delegates unlimited A-E selection approval authority to MSC commanders, who may redelegate this authority to appropriate officials. If a synopsis is for more than one contract, the level of selection approval authority will be determined by the greatest anticipated value of any one of the contracts (including all options), and not the aggregate value of all of the contracts.

b. FAR 36.602-4 and DFARS 236.602-4 provide guidance if the selection authority does not agree with the recommendations of a selection board. All firms on an approved selection list are considered "selected" in accordance with FAR 36.602-4(b). Selection approval authorizes the initiation of negotiation, beginning with the highest qualified firm.

c. No contract may be awarded after one year from the closing date of a public announcement, unless justified in writing by the KO. The KO will consider whether the selected firms' qualifications and the specific A-E market are substantially unchanged since the selection.

3-12. Notifications.

a. Notifications of firms shall be made within 10 days after selection approval in accordance with EFARS 36.607(a)¹⁰. No notifications will be made after a preselection board.

b. The notification shall indicate to the firm that it is:

- The highest qualified, or
- Among the most highly qualified but not the highest qualified, or
- Not among the most highly qualified firms.

The notification will also inform each firm that it may request a debriefing, but must do so in writing or electronically within 10 days after receiving the notification. The identity of the firm (or firms if multiple awards will be made from one synopsis) selected for negotiations may be released after the selection report is approved (FAR 36.607(a)). Within 10 days after contract award, all remaining most highly qualified firms shall be so notified.

c. When an acquisition is canceled, notices will be sent to all firms that responded to the public announcement within 10 days of the cancellation. When an acquisition will be significantly delayed, notices will be promptly sent to all firms still being considered, giving the estimated award date.

3-13. Debriefings.

a. There are two main objectives for a debriefing. First, instill confidence in the debriefed firm that the selection was conducted fairly and objectively in accordance with the announced selection criteria. Second, provide the firm with specific information to allow it to improve its weak qualifications and better compete for future similar projects.

b. Unless impractical, debriefing of unsuccessful firms will be conducted within 14 days after receipt of a written request in accordance with FAR 15.506 (except 15.506(d)(2)-(d)(5)), FAR 36.607(b), and EFARS 36.607(b). A request under the Freedom of Information Act (FOIA; AR 25-55) will be immediately referred to the local FOIA officer.

c. Debriefings will be conducted by telephone, electronically or in person, as

¹⁰ HQUSACE has determined that the time periods for notification and debriefing of firms in FAR 15.503 and 15.506 are impractical to follow for A-E contracts due to the large number of A-E selections annually and the heavy volume of responses to each synopsis. Hence, as permitted by FAR 15.502, the time periods have been reasonably modified for USACE A-E contracts. Also, the specific instruction in FAR 36.607(b) that the (notification and) debriefing of successful and unsuccessful A-E firms will be held after selection approval takes precedence over the instruction in FAR 15.5 that notification and debriefing will occur after contract award.

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mutually agreed. Debriefings will be conducted by a USACE board member, preferably the chairperson, of the preselection or selection board, as appropriate. The debriefing will be based on the preselection or selection board report, as appropriate. The debriefing will summarize the significant weaknesses or deficiencies in a firm's qualifications (FAR 15.506(d)(1)). A firm's qualifications will not be compared point-by-point with those of any other specific firm, but with the other firms collectively (FAR 15.506(e)). Also, a firm's SFs 254/255 will not be revealed or given to any other firm (FAR 15.506(e) and 24.202(a)). The identity of the other firms considered, except the highest qualified firm, shall not be revealed.

3-14. Disposition of SFs 254 and 255. SFs 254 and 255 will be carefully safeguarded, and retained in accordance with EFARS 36.603(b). SFs 254 received by a USACE office will be promptly sent to ACASS if requested by a firm.

3-15. Special Cases.

a. Contract Actions Not Expected to Exceed \$100,000 (SAT). The short A-E selection processes in FAR 36.602-5 may be used. A purchase order, with the appropriate clauses for A-E services, may be used to simplify and expedite award instead of using SF 252, Architect-Engineer Contract.

(1) Contract Actions Expected to Exceed \$25,000 but not \$100,000. A public announcement on the FBO website is required. The response period may be less than 30 days (FAR 5.203(d)); at least 10-15 days is recommended. If an insufficient number of qualified firms respond to the synopsis, other qualified firms may be identified from ACASS and any other means. These firms will be contacted about their interest, sent the synopsis, and requested to submit an updated SF 254 and possibly a SF 255 as required by the selection board. The firms will be given a reasonable period to respond.

(2) Contract Actions Expected to Exceed \$10,000 but not \$25,000. A public announcement on the FBO website is not required. Instead, an announcement may be posted in a public place or made by any appropriate electronic means (FAR 5.101(a)(2)). In addition to the firms that respond to the announcement, other firms may be identified and evaluated as described in paragraph 3-15.a(1).

(3) Contracts Not Expected to Exceed \$10,000. No public announcement is required. A reasonable number of qualified firms must be identified and evaluated as described in paragraph 3-15.a(1).

(4) Contracts Not Exceeding \$2,500. Contracts which do not exceed the micro-purchase threshold of \$2,500 may be procured using purchase cards in accordance with EFARS 36.601-3(S-100) and 36.602-5(a).

b. Non-Appropriated Fund (NAF) Contracts (AR 215-4).

(1) Public announcement is not required. If a contract is synopsized, it may be for less than 30 days. A list of qualified firms may be developed from: ACASS; recommendations of

the installation, NAF sponsor, or professional societies; responses to a public announcement; or, any other appropriate source.

(2) Evaluation boards will be conducted and documented as described elsewhere in this pamphlet, except that the selection criteria will comply with AR 215-4. In particular, equitable distribution of DoD contracts and the extent of participation of SB, SDB, HBCU and MI are not used as selection criteria. Also, geographic proximity need not be treated as a secondary criterion. Normal selection approval procedures are followed.

c. Contracting with the Small Business Administration (FAR 19.8). A-E services may be procured through the SBA's 8(a) Business Development Program. USACE may request the names of 8(a) firms from SBA or recommend qualified 8(a) firms to SBA for approval. A sufficient number of qualified 8(a) firms must be considered such that at least three firms are deemed most highly qualified to provide the required services in order to comply with the Brooks A-E Act¹¹. Firms present their qualifications using a SF 254, and a SF 255 if required by the selection board. The qualifications of 8(a) firms will be reviewed and documented by USACE in accordance with FAR 36.602.

d. Unusual and Compelling Urgency (FAR 5.202(a)(2) and 6.302-2). If the conditions in FAR 6.302-2 are met, public announcement is not required. However, as many firms as is practical under the circumstances should be identified using the process described in paragraph 3-15.a(1). Normal selection and approval procedures are followed.

e. Work Contracted and Performed Outside the United States (FAR 5.202(a)(12)). If the contract action is awarded and performed outside of the United States, public announcement is not required. Normal selection and approval procedures are followed. However, see the restriction in DFARS 236.602-70 on the award of overseas A-E contracts to foreign firms.

f. Medical Facilities. The Medical Facilities Center of Expertise (CEHNC-MX) is the primary technical authority for medical facility engineering and design management. For medical facilities funded by military construction appropriations, MSCs and districts will consult with CEHNC-MX on determination of the appropriate acquisition method, preparation of the synopsis and SOW for A-E services, and conduct of the preselection and selection boards. CEHNC-MX will usually participate in the preselection and selection boards for complex or high cost medical projects, and may participate in the selection board for other medical projects.

g. Design Competition (FAR 36.602-1(b)). The use of design competition shall be approved by HQUSACE (ATTN: CECW-E).

h. Advance Selection Process. EFARS 36.602 (S-100) authorizes an advance A-E

¹¹ A change to EFARS 19.800(b) is pending that will delete reference to a sole-source award of an 8(a) A-E contract.

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announcement and selection process if two or more A-E contracts for the same type of work are reasonably anticipated in a given period in a particular geographic area. Announcement and selection may be conducted prior to receiving specific authorization for any work of that type. Procedures for this process are provided in Appendix U. This process does not apply to ID contracts.

3-16. EP 715-1-4. This pamphlet describes the A-E contracting process in USACE and how firms may obtain consideration for contracts. This information is useful for firms seeking an A-E contract with USACE and should be widely distributed to the A-E community.

CHAPTER 4

NEGOTIATION AND AWARD

4-1. Principles.

a. Contract negotiation is a team effort among properly trained and well-prepared personnel in engineering, contracting, counsel, project management and other appropriate functional elements.

b. Negotiation will be based on a thorough SOW that fully conveys the customer's requirements and the pertinent technical criteria.

c. Negotiations will be conducted in a professional and sincere manner.

d. The primary objective in negotiation is to agree on a price which is fair and reasonable to the Government (not necessarily the lowest price) and gives the A-E firm sufficient financial incentive to produce quality services and products on schedule.

4-2. Responsibilities. Commanders will ensure that personnel who negotiate A-E services are properly trained.

4-3. Regulatory Basis. A-E contract negotiations will be primarily conducted in accordance with FAR 15.4, 36.605 and 36.606, and supplements thereto.

4-4. Negotiation Team.

a. Team Members.

(1) A-E contract negotiation is a team effort among engineers, architects, contracting specialists, counsel, contract auditors (provide advisory support) and other specialists, under the authority of the KO who is solely responsible for the final price agreement (FAR 15.405(a)). The negotiation team must collectively have a thorough knowledge and understanding of the A-E business community, the detailed project requirements, applicable technical criteria, and contracting policies. (In this pamphlet, negotiators means the members of the Government negotiation team.)

(2) There is no regulation that precludes a Government employee who sat on an evaluation board for an A-E contract from participating on the negotiation team for that contract. Also, there is no regulation that precludes a member of the negotiation team from participating in the administration of the contract. However, the KO may impose such restrictions if necessary to ensure the integrity of the system of checks and balances.

b. Training. Engineers, architects and surveyors who are primary participants in A-E negotiations will have the following minimum contracting training:

(1) "Architect-Engineer Contracting," PROSPECT course 004; or DAU course CON

243 (same title).

(2) A course on basic Federal contracting, approved by the local Director/Chief of Contracting, such as DAU course 101, Basics of Contracting, or a commercial course.

(3) A course on Government contract law, approved by the local Director/Chief of Contracting, such as DAU course 210, Government Contract Law, or a commercial course.

4-5. Statement of Work. A thorough SOW is the basis for negotiating a fair and reasonable price, successful performance, and fair and effective administration of an A-E contract or task order. The SOW is included as Section C in the Uniform Contract Format (UCF; FAR 15.204-1 and EFARS 15.204(a)). A SOW will typically include the following topics:

- a. General responsibilities of the A-E firm.
- b. Project description, including estimated construction cost, if relevant.
- c. Scope of A-E services.
- d. Schedule and deliverables. Refer to the most recent guidance from the Tri-Service CADD/GIS Technology Center on sample contract language for CADD and GIS deliverables.
- e. Reviews and conferences.
- f. Technical criteria and standards, including Government-furnished information.
- g. Administrative instructions.
- h. General provisions.

Appendix V is an example statement of work for a task order.

4-6. Request for Price Proposal. A firm will be notified by the KO in writing (except for urgent situations) of its selection for negotiation of a contract action (contract, task order, or modification to a contract or task order) and requested to submit a price proposal (FAR 36.606(b)). Appendix W provides RFPP instructions.

4-7. Preproposal Conference.

a. General. When appropriate, a preproposal conference(s) may be held between the A-E firm and pertinent Government representatives to discuss and resolve questions concerning the contract requirements, SOW, and RFPP instructions. The project site may also be inspected if appropriate. An A-E firm's costs for preparing proposals and attending preproposal conferences are normal costs of doing business and are included in a firm's overhead rate. A firm is not compensated for attending a preproposal conference unless the

firm performs work of tangible benefit to the Government in connection with the conference, and the work is properly authorized in advance by the KO.

b. **Contract Requirements.** At the preproposal conference or at some other time early in the negotiation period, the Government will discuss the following contract requirements with the A-E firm and document these discussions in the price negotiation memorandum (PNM):

(1) Performance evaluation process (FAR 36.604, EFARS 36.604 and Chapter 6 of this pamphlet).

(2) Liability for Government costs resulting from design errors or deficiencies (FAR 36.608, 36.609-2, and 52.236-23, and Chapter 7 of this pamphlet).

(3) Design within funding limitations (FAR 36.609-1 and 52.236-22), when applicable.

(4) Registration of designers (FAR 36.609-4 and 52.236-25), when applicable.

(5) Payments (FAR 32.111(d)(1) and 52.232-10, and paragraph 5-7 of this pamphlet).

(6) Subcontractors and Outside Associates and Consultants (Architect-Engineer Services) (FAR 36.606(e), 44.204(b) and 52.244-4)¹.

(7) Subcontracting plan requirements and reporting if the A-E firm is a large business and the contract is over \$500,000 (see paragraphs 4-15 and 5-8).

4-8. Partnering.

a. **General.** Partnering is the development and sustainment of a relationship that promotes achievement of mutually beneficial goals. See ER 1110-1-12 for additional guidance on partnering, including a sample partnering agreement. If a formal partnering agreement is desired by the Government and/or the A-E firm, it should be discussed during negotiations. However, partnering is voluntary and does not begin until after contract award.

b. **Costs.** Since it is voluntary, a firm is not directly compensated for partnering on its contract. Typically, the Government and the A-E firm share the costs of partnering, with the A-E firm absorbing its costs in its overhead. However, an A-E firm may be compensated for participating in partnering meetings during construction when the firm's attendance is

¹ The prime A-E firm must obtain the KO's consent to change any subcontractors that were identified during selection and negotiation. The KO should refer the qualifications of any new subcontractor to the original selection board (to the extent that these individuals are available) for evaluation. The KO and negotiators may and should strongly encourage contractors to use a qualification-based selection process like the Brooks A-E Act instead of bidding when selecting subcontractors for professional services.

necessary to discuss the design intent, procedures for responding to the construction contractor's questions on the drawings and specifications, scheduling considerations, or similar project issues. Partnering meetings should be scheduled concurrently with required meetings to minimize costs.

4-9. Service Contract Act (SCA). The SCA (FAR 22.10) applies to an A-E contract if the SOW involves the use of service employees (such as drilling and survey crews, clerks, CADD operators, photographers, and laboratory technicians) to a significant or substantial extent. If the SCA applies, a wage determination (WD) must be obtained from the U.S. Department of Labor (DoL) for the service employees anticipated in the contract. In most cases, the WD may be obtained electronically through the Labor Advisor in the local Office of Counsel. The WD must be provided to the firm for use in preparing its proposal. The proposed labor rates and benefits for service employees must be at least equal to the WD. For surveying and mapping contracts, the WD for the location of the performing office shall be used instead for the WD for the location of the work².

4-10. Independent Government Estimate (IGE). In accordance with FAR 36.605(a), an IGE is required for each A-E contract action expected to exceed \$100,000 (total absolute value of all elements of the action, including credits). An informal or working estimate is recommended for actions of \$100,000 or less. An IGE will be prepared and approved in accordance with the procedures in Appendices X and Y. Disclosure of the IGE will comply with FAR 36.605(b).

4-11. Fact-Finding Sessions. The negotiators may hold fact-finding sessions (FAR 15.406-1(a)) with a firm after receiving its price proposal and prior to negotiations. The purpose of fact-finding is to obtain information to better understand the proposal and its assumptions, and to clarify any ambiguities, omissions or uncertainties in the RFPP and SOW apparent after review of the proposal. After fact-finding, a revised proposal may be requested. Detailed proposal analysis or audit should not be performed until a conforming proposal (a proposal that properly reflects the SOW and complies with the RFPP instructions) is received. No negotiation will take place during fact-finding; that is, the Government will not state its bargaining position or objectives during fact-finding.

4-12. Proposal Analysis and Prenegotiation Objectives.

a. **Proposal Analysis.** An A-E proposal will be analyzed in accordance with FAR 15.404 and Appendix Z. Proposal analysis includes technical analysis, price analysis and cost analysis.

b. **Audit.** An audit should be considered for the cases listed in DFARS 215.404-

² In accordance with CIR Information Letter No. 96-3, CECC-L, 26 July 1996, subject: Service Contract Act Wage Determinations Relating to Surveying and Mapping Services.

2(a)(i)³, and this consideration documented in the PNM. An audit is appropriate if the available information is inadequate to determine the reasonableness of the proposed price (FAR 15.404-2(a)). The Defense Contract Audit Agency (DCAA) is the cognizant audit agency for most USACE contracts.

c. Prenegotiation Objectives (PNO).

(1) PNO are developed after a proposal has been analyzed. The PNO are the pertinent negotiation issues and the cost and profit objectives (FAR 15.406-1). The numerical objectives will be shown in a tabular comparison with the corresponding elements of the proposal, IGE, and audit (if available). Keyed to the numerical objectives will be a discussion of the significant differences among the IGE, audit (if performed), PNO and proposal, and the issues to be covered during the negotiations. The PNO may be organized by phase of work, task, discipline, or other appropriate manner. The PNO are documented in a Prenegotiation Memorandum (PnM) which includes the significant details of the contracting action and the course of action the negotiators intend to pursue (AFARS 5115.406-1(b)).

(2) The review and approval of the PnM will be in accordance with local procedures and at the lowest practicable level appropriate for the complexity, risk and dollar value of the contract action. Local procedures may exempt the review and approval of PnM for small or routine actions.

4-13. Negotiation of FFP Contracts.

a. Conduct of Negotiations. Negotiations should be conducted in an atmosphere of professionalism, patience, and trust. The KO will assign appropriate responsibilities to the team members according to their expertise and maintain overall positive control of the negotiations. The negotiation team must be fully prepared and know what flexibility there is in the Government position. The negotiators must focus on the pertinent issues and be willing to adjust the Government's position when appropriate.

b. Statement of Work.

(1) General. The Government and A-E firm should have a common understanding of the SOW before discussing effort and price. The negotiators must ensure that the firm is proposing to use personnel and procedures appropriate for the required work. The negotiators must know if there is any flexibility in the SOW requirements, including the performance schedule. It might be possible to reach agreement if one or more items in the SOW are modified or deleted, or provided by the Government.

³ Also consider an audit for an ID contract where the total contract amount, including all option periods, exceeds the pertinent threshold in DFARS 215.404-2(a)(i) for the anticipated type of task order (fixed-price or cost-reimbursement).

(2) Construction Cost. For a contract involving design, agreement must be reached on the estimated construction cost (ECC) of the project because it directly impacts compliance with the 6 percent statutory limitation (paragraph 4-13.c(3)) and the Design within Funding Limitation clause (paragraph 4-7.b(6)). The A-E firm must submit evidence of any perceived deficiencies in the Government cost estimate before the Government agrees to any adjustment to the ECC.

c. Price. Bottom-line price agreement is the primary negotiation objective. However, the negotiators should make a bottom-line price offer only as a final attempt to reach agreement after there is a common understanding of the SOW. The negotiators should not be preoccupied with any single cost item (such as labor hours, labor rates, overhead rates or profit) since agreement on every item is not required to reach overall price agreement (FAR 15.405(a) and (b)). Conversely, final agreement does not indicate agreement on all elements of the proposal. Significant items affecting price agreement must be discussed in accordance with the PNO. The negotiators should not place themselves in a position where they are defending the Government's position. Rather, a firm should be requested to explain and support its proposal and to offer appropriate revisions. Significant elements in price negotiation are discussed below.

(1) Labor and Overhead Costs.

(a) Position classifications and labor hours will be evaluated in the technical analysis (Appendix Z). Labor rates will be examined by audit or review of payroll records and evaluated for reasonableness. Overhead costs will be reviewed, which may include an audit, for allowability in accordance with FAR 31.2. The review will address the allocability of overhead costs to the contract, the acceptability of specific costs according to FAR 31.205, conformance with accounting standards (FAR 30), and reasonableness.

(b) Labor and overhead rates are negotiable. The reasonableness of labor and overhead rates will be evaluated by comparison with relevant market surveys (Appendix Y) and similar recent proposals (FAR 15.404-1(c)). When assessing reasonableness, a firm's costs should be compared to efficient, competitive firms in the same class (see Appendix X, paragraph 6.a). Verification of the actuality of labor rates and overhead rates, such as by audit, does not necessarily mean that they are reasonable. Also, firms can properly allocate costs in different ways. Hence, overhead rates, labor rates and the assignment of costs as direct or overhead must be considered together to fairly evaluate reasonableness.

(c) Accordingly, the PNO for labor rates and overhead rates shall not be based upon arbitrary caps. If labor rates and/or overhead rates are so high as to make the total price unreasonable, the negotiators should first seek justifiable reductions in the judgmental elements of the proposal (such as labor hours and position classifications) before negotiating the labor rates and overhead rates.

(2) Profit. It is in the Government's interest to negotiate sufficient profit to stimulate efficient contract performance and to attract the best qualified firms (FAR 15.404-4(a)(2) and (3)). Profit must not be negotiated until all costs have been agreed to. The negotiators

should be primarily concerned with the total dollar amount of proposed profit, and not the method or rationale used by the firm to estimate profit for itself and any subcontractors (FAR 15.404-4(c)(5)). The profit method for A-E contracts in EFARS 15.404-73-101 is only used in preparing the Government estimate of a fair and reasonable price. A firm is not required to compute its profit by this method.

(3) Statutory Limitation. The portion of the contract price for A-E services for the preparation of designs, plans, drawings and specifications may not exceed 6 percent of the project's ECC (FAR 15.404-4(c)(4)(i)(B) and 36.606(a), and DFARS 236.606-70). This limitation is statutory (10 U.S.C. 4540(b)). EFARS 36.606-70(c) provides examples of services that may be excluded from the A-E contract price when determining compliance with the statutory limitation. These examples will be used as a guide in determining other types of services that may be excluded. Preparation of the construction cost estimate is not excluded.⁴ The 6 percent statutory limitation does not apply to a design-build contract, but does apply to an A-E contract for developing a design-build solicitation.

d. Acceptance or Termination of Negotiations. If agreement is reached, the firm will be advised not to begin work until directed by the KO. If agreement can not be reached, the firm will be requested to submit its best and final offer in writing (FAR 36.606(f)) within a reasonable time. If the firm does not submit a final offer in the stated time, its last written proposal will be used as the final offer. No further discussions will be held with a firm if its final offer is not completely acceptable. The firm will be sent a brief letter stating that negotiations are terminated. A PNM will be prepared documenting the unsuccessful negotiations and be approved by the KO. Negotiations may then begin with the next ranked firm. To preclude complaint or protest by the unsuccessful firm, no significant changes should be made in the SOW during negotiations with the next firm.

e. Modifications. The negotiation of modifications generally follows the same procedures as the negotiation of contracts in accordance with FAR Part 43.

4-14. Negotiation of ID Contracts. The negotiation of an ID contract is similar to a FFP contract, however the negotiation of total prices pertains only to the task orders issued under an ID contract. Agreement on labor rates and overhead rates is the central issue in the negotiation of an ID contract.

a. Labor and Overhead Rates.

⁴ Preparation of the cost estimate is an integral part of "producing and delivering designs, plans, drawings and specifications" and is therefore, subject to the 6 percent limitation. The mandatory Design within Funding Limitation Clause (FAR 52.236-22) requires an A-E firm to design a project within the construction budget. The estimate must be prepared coincident with the construction documents to guide the selection of materials, components, and systems and keep the project within budget. Hence, the estimate is a necessary and integral part of the design process, and is not excludable.

(1) Labor and overhead rates will be evaluated similar to a FFP contract. Negotiation should concentrate on the important position classifications anticipated to be used in the contract. A specific hourly or daily rate must be negotiated for each position classification, and a common understanding reached on the type of work that each level of employee will do.

(2) Disagreement over the labor rate for a certain position classification might be resolved by the use of additional classification levels (such as three experience levels for an architect instead of one), or by adjusting the proportion of time of individual employees with different labor rates which comprise that classification. Also, disagreement over labor and/or overhead rates may be resolved by negotiating composite labor and overhead rates. Rates (or a method for determining rates, such as reference to Engineering News-Record cost indices) for contract option periods must also be negotiated.

b. Travel. The schedule of negotiated contract rates will include unit costs for all anticipated travel items such as vehicle cost per mile or day and per diem for certain locations of work. For travel that can not be anticipated, the contract may include a statement that travel costs will be computed in accordance with FAR 31.205-46.

c. Other Direct Costs. A unit cost or price should be negotiated for all anticipated supplies (such as survey monuments) or support services (such as soils tests or computer use). Unit costs or prices may also be negotiated for specific types of services, such as a daily rate for a survey crew or per acre rate for a topographic survey.

d. Profit. Profit will usually be negotiated for each task order under an ID contract. However, a standard profit rate for all task orders may be established in an ID contract if all orders will be very similar in nature, complexity, risk, price, and performance period. In either case, the profit rate will be applied to the total of the prime firm's costs and any subcontractors' costs (without profit) to avoid unreasonable layering of profit (i.e., no profit on profit).

e. Acceptance or Termination of Negotiations. Agreement on every rate, such as labor, overhead, or travel, is not necessary. The negotiators should consider the impact of specific rates on the prices of typical task orders anticipated under the contract. The rates for certain classifications (such as a principal) may exceed the PNO but may not be significant costs in typical task orders. If the final offer is not acceptable, negotiations will be terminated similar to a FFP contract.

f. Task Orders.

(1) The negotiation of a FFP task order is very similar to a FFP contract, except that the labor rates, overhead rates, and certain other unit costs or prices (and maybe profit) are already fixed in the ID contract. Also, there is a limitation in an ID contract on the cumulative amount of all orders that must be considered, and possibly a limitation on the price of individual task orders. Negotiation typically concerns the quantity and mix of various position classifications. A task order may be modified, have options, or include work

involving minor cost elements that are not in the contract rate schedule.

(2) The SOW of a task order must be within the scope of the ID contract (FAR 16.505(a)(2)). For any task order over \$500,000, the contract file must be documented to justify why a task order was used instead of publicly announcing the requirement (EFARS 36.601-3-90(c)). The reasons should relate to the basic reasons for using an ID contract in EFARS 16.501(S-103)(a). Also, the contract file must be documented to justify the basis for issuing a task order under a particular ID contract when the order could have been issued under more than one ID contract (EFARS 16.505(b)(1)). Price can not be considered.

4-15. Subcontracting Plan. A Small Business Subcontracting Plan is required for any A-E contract over \$500,000 (including any options) with a large business if there are subcontracting possibilities (FAR 19.702, 19.704, 19.705-2 and 52.219-8). See Appendix J for further details. The subcontracting plan is an element of the negotiation process and is made a part of the contract. A change in subcontractors from those proposed on the SF 255 must be approved by the KO (FAR 44.201-3(a)); see paragraph 4-7(b)(6)).

4-16. Price Negotiation Memorandum. The negotiators will complete the PNM (FAR 15.406-3 and supplements thereto) promptly after concluding negotiations. A PNM will discuss the principal elements of the negotiation. The PNM will demonstrate that the final accepted price complies with the 6 percent statutory limitation, if applicable. If an audit was performed, the PNM will discuss any deviations from the audit recommendations in the final negotiated price. A PNM shall be prepared, reviewed and approved in accordance with local procedures (EFARS 15.406-3(a)). Ordinarily, review and approval of a PNM should be concurrent with the review and approval of the final contract instrument.

4-17. Preaward Survey. The selection process addresses the technical capability, production resources and quality assurance methods of the firm. Hence, a short-form preaward survey report (only SF 1403, Preaward Survey of Prospective Contractor (General)) in accordance with FAR 9.106-4(d) is typically adequate. The preaward survey can be initiated after selection approval to avoid delaying award of a contract. The main emphasis of the preaward survey should be checking the financial capability of the firm through Dunn and Bradstreet reports, statements from the firm's bank, annual financial statements, or other appropriate means. Also, a contractor must be registered in the DoD Central Contractor Registration (CCR)⁵ to be eligible for a contract (DFARS 204.73 and 252.204-7004).

4-18. Contract Preparation and Award.

a. General. An A-E contract will be prepared using the uniform contract format in

⁵ A firm does not have to be registered in the CCR, nor have a Data Universal Numbering System (DUNS) number or Commercial and Government Entity (CAGE) code (both of which are required by the CCR), to be considered by an A-E evaluation board. Hence, a synopsis may request that interested firms include their DUNS number and/or CAGE code on their SF 255, if already assigned, but not mandate that firms obtain these identifiers as a condition of submission.

FAR 15.204.1, using SF 252, "Architect-Engineer Contract," as the cover sheet (FAR 36.702(a)). The contract may state a notice to proceed (NTP) date or the KO may send a separate NTP letter after contract award. If a contract is executed by mail, the KO should sign the contract after it has been signed by the contractor (FAR 4.101). However, if the action is urgent, an award letter (Appendix M) can be used, which also serves as the NTP.

b. **ID Contracts.** In order to satisfy the minimum contract guarantee (EFARS 16.504(a)(1)), the best practice is to issue the first task order using project funds at the same time the ID contract is awarded. If the first task order is not issued simultaneously with award of the ID contract, then the minimum guarantee shall be obligated⁶ at the time of contract award using project funds, if the contract is customer-specific, or using the appropriate departmental overhead or revolving funds, if the contract serves many customers.

4-19. **Task Order Issuance.** IDC task orders are prepared using DD Form 1155, Order for Supplies or Services (DFARS 216.506). A DD Form 1155 for an ID contract task order need only be signed by the KO or ordering officer. The DD Form 1155 is a NTP.

4-20. **NAF Contracts.** AR 215-4 specifies the general procedures for NAF contracting. The FAR and its supplements, including the 6 percent statutory limitation, do not apply. Otherwise, the negotiation of an A-E contract for an NAF project should generally comply with this pamphlet.

4-21. **Continuing Contracts Clause.** The alternate continuing contracts clause prescribed at EFARS 32.705-100(b), and found at 52.232-5002, is appropriate for use in A-E contracts for civil works projects, including ID contracts⁷. The clause is used for incrementally-funded contracts when no contracting authority exists to obligate the entire contract price in advance of appropriations. Each increment of funding should produce a deliverable, such a required interim submittal.

⁶ Immediately upon award of a task order(s) in sufficient amount to satisfy the minimum guarantee, the KO must deobligate the funds used to award the ID contract.

⁷ A change to EFARS 32.705-100 is pending that will allow use of the "true" continuing contracts clause in A-E contracts for civil works water resource projects specifically adopted by Congress in authorizing legislation.

CHAPTER 5

CONTRACT ADMINISTRATION AND MANAGEMENT

5-1. Introduction. This chapter addresses certain, but not all, aspects of A-E contract administration and management. Chapters 6 and 7 address in detail two other very important aspects of A-E contract administration - evaluating performance and enforcing design responsibility, respectively.

5-2. Principles.

a. A-E contracts will be proactively managed to ensure the timely delivery of quality products and services.

b. A-E firms will be treated fairly and professionally.

5-3. General. The administration and management of an A-E contract is a team effort among the KO, contract specialist, contracting officer's representative (COR) and other technical personnel, the PM, and others. The primary functions in administering and managing an A-E contract are:

a. Monitoring the A-E firm's performance, ensuring compliance with the contract, and enforcing the responsibility of the firm for the quality of its work.

b. Ensuring the firm has an adequate quality control process, and reviewing the A-E products for conformance with the technical requirements of the contract.

c. Evaluating the firm's performance.

d. Maintaining liaison and direct communications with the A-E firm, and promptly resolving any questions and issues that may arise.

e. Providing required Government-furnished information and materials, and arranging access to work areas.

f. Paying the firm in a timely manner for satisfactorily completed work.

g. Modifying the contract as required to accommodate changes in requirements.

h. Closing out the contract.

5-4. Contracting Officer's Representative.

a. The appointment and responsibilities of a COR are described in DFARS 201.602-2. A COR assists the KO with technical monitoring and administration of the contract. A COR must have the training listed in paragraph 4-4.b as well as any other training specified by the

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KO, and have considerable experience in contract administration. There is no regulation which precludes a Government employee that participated in the evaluation boards for and/or negotiation of an A-E contract from being a COR on that contract. However, the KO may impose such restrictions if necessary to ensure the integrity of the system of checks and balances.

b. A COR may be in any organizational element¹ as long as the COR is in a position to directly monitor an A-E firm's performance and the system of checks and balances is maintained. During construction, an appropriate, qualified person in the field office may be appointed as COR for an A-E contract, especially if the A-E firm is required to provide certain construction phase services².

5-5. Quality Management. The quality management procedures, practices and tools in ER 1110-1-12 will be employed to ensure that the A-E firm delivers excellent engineering and design services and products to the customer on schedule and within budget.

5-6. ID Contracts.

a. Management of Contract Limitation. An ID contract is typically used by more than one organizational unit. Hence, a process must be established for all ID contracts to reserve an estimated amount for a planned task order and to track the actual prices of orders to ensure the limit for the contract or contract period (if applicable) is not exceeded.

b. Contract Limitations. See EFARS 36.601-3-90 regarding limitations on the amount and duration of A-E ID contracts, and waivers thereof. See EFARS 16.5 on general guidance for ID contracts, and paragraph 4-18.b regarding the minimum guarantee.

c. Ordering. See EFARS 16.505(b)(1). When two or more ID contracts contain the same or overlapping scopes of work (including, but not necessarily, multiple award contracts) so that a particular task order might be issued under more than one contract, the contract file must be documented to show the basis for selecting a particular contractor for negotiation of a task order.

d. Installation Use of ID Contracts. When authorized by a USACE command, installations may use USACE A-E ID contracts (AFARS 5136.600-90 and EFARS 36.601-3-90(i)). Qualified public works personnel may be appointed as COR to administer orders. Also, if mutually agreed between USACE and the installation, an installation KO may be appointed as an ordering officer to issue task orders. In any case, the USACE KO shall

¹ For example, a PM may be a COR, depending on local practices.

² Construction phase services include, for example, design modifications to accommodate unforeseen site conditions or criteria changes, review of contractor value engineering change proposals, site visits to evaluate the acceptability of completed construction or monitor certain tests, review of shop drawings, and assistance with commissioning.

provide written instructions to the installation KO and facilities engineering personnel regarding the limitations and procedures for the negotiation, issuance and administration of task orders. These instructions will address USACE and installation responsibilities, and include:

- (1) SOW preparation.
- (2) Requirements for preparation of an IGE (FAR and EFARS 36.605, and Appendix X).
- (3) Negotiation procedures, including compliance with the 6 percent statutory limitation (DFARS 236.606-70). Also indicate that any failure to reach agreement must be referred to the USACE KO.
- (4) Preparation of the DD Form 1155.
- (5) Funding and payments.
- (6) Requirement for design within the construction funding limitations (FAR 36.609-1).
- (7) Enforcing the responsibility and liability of the A-E firm for design errors or deficiencies (FAR 36.608 and 36.609-2, and Chapter 7).
- (8) Resolution of disputes.
- (9) Preparation of performance evaluation (FAR and EFARS 36.604, and Chapter 6).
- (10) Contract documentation.

5-7. Payments.

a. FAR 52.232-10 is the payment clause for A-E contracts. The payment clause and process should be discussed with an A-E firm during negotiations. The clause allows for monthly progress payments. The contract (typically under Section G, Contract Administration Data) should specify the format of the payment request (typically ENG Form 93, Payment Estimate - Contractor Performance is used) and any required supporting data, such as a written description of the work completed in the payment period, a bar chart of work progress, and example work products. Payments are by electronic funds transfer in accordance with the Debt Collection Act of 1996, and must be made promptly in accordance with FAR 52.232-26, Prompt Payment for Fixed-Price A-E Contracts. Generally, payment must be made within 30 days after receipt of a proper invoice from a contractor.

b. The PM, COR and/or other technical staff may also visit the A-E firm's office to verify progress. The COR will reduce the payment estimate, if warranted, to conform to the

actual satisfactory progress and promptly notify the A-E firm in accordance with the prompt payment clause (FAR 52.232-26). Typically, the KO delegates the authority to approve progress payments to the COR. However, the KO usually approves the final payment.

c. The payment clause allows for up to 10 percent of an approved progress payment to be retained to protect the interests of the Government. However, retainage should not be automatically withheld from each payment if the PM and COR is certain of the progress and the quality of the completed work. Retainage should not be held in an amount greater than, or for a period longer than, absolutely needed to protect the Government. All retainage should be paid when discrete phases of the project are satisfactorily completed. Retainage shall never be applied in a punitive manner. Also see the guidance in FAR 32.103 which is equally applicable to A-E contracts.

5-8. Subcontract Reporting. A contractor must report semiannually on its progress in complying with the subcontracting goals agreed to in the subcontracting plan using SF 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report (FAR Clause 52.219-9). The contract administration team must ensure that the A-E firm makes a good faith effort to comply with the subcontracting plan and submits the required reports to the KO in a timely manner. Compliance with the subcontracting plan is an attribute on the A-E performance evaluation form.

5-9. Resolving Performance Problems. Proactive day-to-day oversight of an A-E contract by the PM, COR and/or other technical staff, including frequent communications with the firm, will prevent most A-E performance problems. However, the A-E firm must be promptly advised whenever its performance is marginal or unsatisfactory. If performance continues to be marginal or unsatisfactory, the Government shall take stronger action to improve the firm's performance. The following methods, in general order of increasing impact and severity, should be used to resolve A-E performance problems:

- a. Verbal notice to the firm by the COR. Document in the contract file. (The COR should keep the KO informed on any corrective action.)
- b. Letter to the firm from the COR citing specific deficiencies and required corrective action.
- c. Meeting between the firm and the COR and possibly PM. Document in the contract file.
- d. Meeting between the firm and the Chief of Engineering. Inform the firm that an interim "marginal" or "unsatisfactory" performance evaluation will be prepared if its performance does not promptly improve, and that this evaluation could affect its selection for other contracts. Document in the contract file.
- e. An interim "marginal" or "unsatisfactory" performance evaluation in accordance with the procedures in Chapter 6.

f. Meeting between the firm and the KO and PM and/or COR. Document in the contract file.

g. A “cure” notice to the firm from the KO (FAR 49.402-3(c) and (d)). The cure notice must cite the specific deficiencies, required corrective actions, and suspense date.

h. A “show” cause notice to the firm from the KO (FAR 49.402-3(e)), notifying the firm of the possibility of termination.

i. A final "marginal" or “unsatisfactory” performance evaluation.

j. Termination for default (FAR 49.4), which shall always be accompanied by a final “unsatisfactory” performance evaluation.

Also, see Chapter 7 regarding an A-E firm's responsibility for errors or deficiencies in design or other services discovered after completion of the contract work.

5-10. Contract Closeout.

a. An A-E contract must be closed out promptly after satisfactory completion and delivery of all required services and products. However, in the case of an A-E contract for the design of a particular construction project, A-E services are often required during the construction period that can not be definitively anticipated or priced when the contract is awarded (or even when the design is completed). The A-E contract should typically remain open to readily accommodate these potential changes.

b. In order to preserve the Government’s ability to add work during the construction period that can not be quantified or priced at the time of the award of the original contract, the synopsis and the scope of an A-E contract for the design of a particular project should include a statement that additional work is contemplated (list the types of possible services such as in the footnote 2) during the construction period and may be added pursuant to the Changes clause (FAR 52.243-1, Alternate III). It is not acceptable to withhold earned payment from a firm as a means to keep the contract open.

c. FAR 4.804 provides general procedures for contract closeout. For an A-E contract, the following additional actions are required:

(1) All liability actions resolved.

(2) Performance evaluation(s) prepared, approved and distributed.

(3) Return of all Government-furnished materials.

(4) Release of claims executed.

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(5) Final SFs 294 and 295.

CHAPTER 6

PERFORMANCE EVALUATION

6-1. Principles.

- a. Accurate and timely performance evaluations support the USACE objective of continuously improving the quality of A-E services and products.
- b. The performance of A-E firms shall be evaluated fairly and objectively. Ratings are ultimately the decision of the Government and are not subject to negotiation with A-E firms. However, overall ratings¹ of "marginal" and "unsatisfactory" may be rebutted by A-E firms in accordance with the procedures herein.
- c. A-E firms shall be kept apprised of the quality of their work throughout contract performance and shall promptly be sent copies of completed performance evaluations.

6-2. Responsibilities.

- a. The Chief of Engineering in each operating command² is responsible for the A-E performance evaluation process in the command.
- b. Area engineers and resident engineers (AE/RE) are responsible for preparing A-E evaluations after the completion of USACE-managed construction projects.

6-3. Regulatory Background. This pamphlet implements³:

- a. FAR 36.604, which requires that the performance of A-E contractors be evaluated and that files of performance evaluations be maintained for use in selecting firms for A-E contracts,
- b. DFARS 236.604, which requires a separate performance evaluation after completion of construction and specifies that all DoD agencies forward completed evaluations to the "central data base" maintained by USACE (ACASS), and

¹ This pamphlet is based on the April 1999 edition of DD Form 2631, Performance Evaluation (Architect-Engineer), which replaced the November 1992 edition. The new overall ratings are "exceptional," "very good," "satisfactory," "marginal" and "unsatisfactory." The 1992 edition of the form had corresponding overall ratings of "excellent," "above average," "average," "below average" and "poor."

² See definition in paragraph 2-2.a.

³ FAR Subpart 42.15, and the supplements thereto, addresses recording and maintaining contractor performance information, but, by its terms, does not apply to A-E services.

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- c. EFARS 36.604, which amplifies certain requirements of the FAR and DFARS.

6-4. General Procedures.

a. Implementation. The Chief of Engineering will establish written procedures, including a tracking system, to ensure the timely preparation, approval and distribution of all required A-E evaluations in accordance with this pamphlet. (A recommended process is to coordinate completion of the performance evaluation with processing of the final payment.) A-E evaluations shall be scheduled events in the management plan for a project.

b. Contracts Requiring Performance Evaluation. Performance evaluations are required for all contracts⁴ and task orders for A-E services in excess of \$25,000, but may be prepared for lesser contracts (FAR 36.604 (a)). Design services provided under a design-build contract are not given an A-E performance evaluation and are not subject to this pamphlet. Instead, the quality of the design services in a design-build contract will be addressed in the remarks section on the construction performance evaluation form (DD Form 2626).

- c. Preparation of Evaluations.

(1) A performance evaluation shall be prepared by the engineers, architects and other technical personnel who reviewed and accepted the A-E firm's work, as recommended by FAR 36.604 (a)(1). Sufficient effort must be devoted to this function so that thorough and fair evaluations are completed in a timely manner.

(2) Performance evaluations (except marginal or unsatisfactory) shall be prepared, reviewed, approved and distributed within 60 days of the designated milestones in paragraphs 6-7 and 6-8. Additional time will generally be required for evaluations with an overall rating of "marginal" or "unsatisfactory" if rebutted by the A-E firm (see paragraph 6-10).

d. Evaluation Form. Performance evaluations shall be prepared on DD Form 2631⁵ (DFARS 236.604(a)) in accordance with the instructions in Appendix AA. The performance evaluation software provided by the Contractor Appraisal Information Center will be used instead of the actual form to facilitate the preparation and routing of evaluations, as well as the transmittal and entry into ACASS. A hard copy must be printed and signed by the rating and reviewing officials for inclusion in the contract file and for sending to the A-E firm.

e. Assignment of Overall Ratings. The overall rating is based on the ratings in the discipline and attribute matrices. While this is a matter of judgment, general guidance is given below to promote uniformity.

⁴ Exclusive of ID contracts, which are evaluated on the basis of individual task orders.

⁵ The ACASS software presently conforms to the November 1992 edition of DD Form 2631. This software will continue to be used until it is updated to reflect the current edition of the form.

(1) "Exceptional." All or almost all of the significant disciplines and attributes are rated "exceptional." No discipline or attribute should be "marginal" or "unsatisfactory."

(2) "Very Good." A majority of the significant disciplines and attributes are rated "exceptional" or "very good." No significant discipline or attribute should be "marginal" or "unsatisfactory."

(3) "Satisfactory." No significant discipline or attribute should be "unsatisfactory." Quality of final work is acceptable in an overall sense; however, it may have been necessary to get the firm to correct some unacceptable work.

(4) "Marginal." One or two significant disciplines or attributes are rated "unsatisfactory," or all or almost disciplines or attributes are rated "marginal." An unusual amount of extra effort and follow-up on the part of the Government was required in order to get an acceptable product.

(5) "Unsatisfactory." Several significant disciplines and attributes are rated "unsatisfactory." This rating is appropriate for a firm that does not produce acceptable work despite extensive effort by the Government. This rating is required for all contracts terminated for default.

f. Remarks. The remarks in Item 20 of the DD Form 2631 should support and be compatible with the overall rating. A rating of "marginal" or "unsatisfactory" must be fully explained in the remarks. Also, the remarks should not suggest that the firm really did "marginal" work when the overall rating is "satisfactory."

g. Safeguarding Evaluations. Completed A-E performance evaluations are classified as "For Official Use Only" in accordance with AR 25-55. All pages of the evaluation shall be stamped or marked at the top and bottom "For Official Use Only" in accordance with the provisions of AR 25-55, Section 2, Markings. A firm's evaluations will only be given to proper representatives of the firm, to representatives of a Federal agency having a legitimate need for this information, and to ACASS.

h. Contract Negotiation. The performance evaluation form and procedures shall be discussed with an A-E firm during contract negotiation (EFARS 36.604(S-100) and paragraph 4-7.b). The Government will clearly describe its performance expectations, and stress the importance of the performance evaluation in future selections. The PNM will indicate that this discussion took place.

i. A-E Office Location. Enter in Item 6 of the DD Form 2631 the A-E office location that had the lead role in performing the work, which may not be the office that signed the contract. The evaluation will not be useful or relevant in future selections if it does not reflect the actual performing office.

k. Responsible Command. When more than one command is involved in the

execution of a project, the command having KO authority for administration of the A-E contract is responsible for preparation of the A-E performance evaluation. The responsibility for the A-E performance evaluation will be included in the overall management plan for the project (see ER 5-1-11).

1. A-E Contracts Awarded for Installations.

(1) This chapter also applies to A-E contracts awarded by USACE for administration by Army installations or other activities. As required by paragraph 5-6.c, the USACE KO will issue instructions to the installation on the preparation of performance evaluations, including preparation of the A-E evaluation after completion of construction when the installation is responsible for managing the construction contract.

(2) If a person at the installation has COR authority for the A-E contract, this person may act as the rating official. Otherwise, the chief of the unit in the Directorate of Public Works or similar engineering office charged with the oversight responsibility for the A-E contract will act as the rating official. The reviewing official will be the Chief, or Assistant Chief, of Engineering of the supporting USACE district.

6-5. Monitoring Performance.

a. General. The quality of an A-E firm's products and services must be adequately documented throughout the performance of the contract and the firm kept apprised of the quality of its work (EFARS 36.604(S-100)). An A-E firm will be notified immediately upon recognition of marginal or unsatisfactory performance as outlined in paragraph 5-9.

b. Appraisals. Operating commands shall establish procedures to appraise the quality of each A-E submittal, using the discipline and attribute matrices on the DD Form 2631. The appraisals will be supplemented as appropriate with narrative that supports the rating and will assist the PM and COR in communications with the A-E on submittal quality. These appraisals will be made by each of the pertinent disciplines. It is particularly important to adequately document any area of unsatisfactory or exceptional performance. These appraisals constitute the basis for interim and final performance evaluations and shall be retained in the contract files.

6-6. Interim Evaluations.

a. General. An interim performance evaluation (FAR and EFARS 36.604(a)(3)) will be prepared under the following conditions, in accordance with the procedures in paragraph 6.7.c:

(1) A cumulative, interim evaluation will be prepared at least annually for a task order or a FP or CR contract with a performance period anticipated to exceed 12 months (EFARS 36.604(S-102))⁶.

⁶ A change is pending to EFARS 36.604(S-102) to change 12 months to 18 months.

(2) An interim evaluation will be prepared whenever a project is deferred for more than 3 months if a substantial portion of the work has been completed.

(3) An interim evaluation will be prepared when a firm's performance is "marginal" or "unsatisfactory" (EFARS 36.604(a)(3)) after reasonable steps have been taken by the Government to improve the firm's performance (see paragraph 5-9). An interim evaluation formally puts a firm on notice that its performance is inadequate in order to encourage improvement and to make the information on the firm's performance available to other contracting offices in a timely manner. An interim "marginal" or "unsatisfactory" evaluation provides a very strong basis for a final "marginal" or "unsatisfactory" evaluation (see paragraph 6-10) if a firm's performance does not improve.

(4) At any other appropriate time.

b. Approval and Distribution. Interim evaluations will be approved and distributed in accordance with paragraph 6-9. The basis for an interim "marginal" or "unsatisfactory" evaluation must be well documented. An interim "marginal" or "unsatisfactory" evaluation is subject to the rebuttal process in paragraph 6-10, and will not be distributed until the rebuttal process is completed (EFARS 36.604(a)(4)). Interim evaluations that have been transmitted to ACASS will be replaced by the final evaluation. Fax a copy of the interim evaluation to the CAIC (503-808-4596), with a request that the evaluation be removed. Any interim "marginal" or "unsatisfactory" evaluations and a summary of any actions the firm took to remedy the deficiencies shall be recorded in Item 20, "Remarks" of the final evaluation.

6-7. Evaluation of A-E Performance after Completion of Design or Engineering Services.

a. General. A final evaluation will be prepared for each task order or FP or CR contract exceeding \$25,000 (EFARS 36.604(S-101)). For engineering services not directly related to design, the evaluation shall be prepared after acceptance of the A-E products. For design services, the evaluation shall be prepared after the construction bid opening, provided the bid opening is scheduled to occur within 3 months of design completion. Otherwise, the evaluation will be prepared after completion of the design.

b. Preparation. The final performance evaluation will be based on the appraisals prepared by the technical reviewers and input received from the PM and customer, as well as any interim evaluations. The COR will assign the overall rating and sign the form as the rating official. A copy of the evaluation will be sent to the PM when the evaluation is forwarded for approval.

c. Contract Termination. A performance evaluation shall be prepared for a task order or a FP or CR contract terminated for any reason prior to completion of the work if the value of services completed at termination exceeds \$25,000 or if the contract was terminated for default.

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6-8. Evaluation of A-E Performance after Completion of Construction.

a. General. An evaluation (referred to herein as the A-E construction evaluation) shall be prepared after substantial physical completion of each construction project based on an A-E design where the price of the A-E services (performed by task order or FP or CR contract) exceeds \$25,000 (EFARS 36.604(S-101)).

b. Preparation.

(1) During construction, the AE/RE is responsible for assessing the accuracy and completeness of the A-E firm's work and its responsiveness in resolving design problems that arise during construction. Sufficient documentation will be maintained by the AE/RE to support the A-E construction evaluation. Use of the discipline and attribute matrices on the DD Form 2631 can assist in documenting performance during construction and in communicating with the A-E firm on design problems. The AE/RE will coordinate the evaluation with the design COR and PM.

(2) The AE/RE will prepare the A-E construction evaluation, assign the overall rating, and sign the form as the rating official. The evaluation, with any supporting documentation, will be forwarded through the Chief of Construction to the Engineering Division.

c. Review and Approval. Engineering Division will promptly review and approve an A-E construction evaluation after receipt from the Construction Division. No changes will be made in the A-E construction evaluation without the concurrence of the AE/RE, design COR and PM.

(1) Any significant differences in assessment between the design and construction evaluations will be resolved. This may require reevaluation of some aspects of the design by the personnel who reviewed the A-E firm's work during the design phase. Particular attention should be given to discipline or attribute ratings that could possibly reflect a misunderstanding of the A-E firm's responsibility. Any questions of this nature should be discussed with the AE/RE and the construction modification file reviewed if necessary.

(2) As a consequence of the A-E construction evaluation, or other factors, Engineering Division may wish to change some of the ratings given for disciplines or attributes in the design evaluation. If so, the matrices on page 2 of the A-E construction evaluation, applying to design/engineering services, shall be completed and a statement made in Item 20, "Remarks," giving the reason for the change. If Engineering Division wishes to change the overall rating on the design evaluation, a revised evaluation will be prepared and faxed to the CAIC (503-808-4596) in accordance with paragraph 6-9.c(1). A statement shall be made in Item 20, "Remarks," giving the reason(s) for the revision.

e. Review of A-E Liability. The COR will obtain the A-E liability information for Item 11 of the DD Form 2631 from the A-E Responsibility Coordinator (AERC; see Chapter 7). Refer to the instructions in Appendix AA. An updated evaluation will be transmitted to ACASS as specified in paragraph 6-9.c(2) if there is a later change in the A-E liability

information. Completion of an evaluation shall not be delayed because liability determinations have not been resolved.

6-9. Approval, Distribution and Revision of Evaluations.

a. Approval. The reviewing official for A-E performance evaluations shall be the Chief or Assistant Chief of Engineering, unless a proposed "marginal" or "unsatisfactory" evaluation is rebutted (see paragraph 6-10). The reviewing official will review the performance evaluation and the supporting documentation to assure that the overall rating is justified. The date of the reviewing official's signature is the official date of the evaluation.

b. Distribution.

(1) The original signed copy of each interim and final performance evaluation shall be placed in the A-E contract file. Performance evaluations will be promptly transmitted electronically to ACASS, except when rebutted by the A-E firm in accordance with paragraph 6-10.

(2) A copy of each interim and final performance evaluation will be promptly sent to the A-E firm. The cover correspondence may be signed by the COR, except for "marginal" or "unsatisfactory" ratings, which shall be signed by the KO.

c. Revisions and Corrections.

(1) A performance evaluation may be changed by the reviewing official, or successor, upon presentation of adequate evidence. However, no changes shall be made in an A-E construction evaluation without concurrence of the AE/RE. A statement must be included in Item 20, "Remarks," describing the change and explaining why it was made.

(2) The revised evaluation, highlighted in colored marker to show the changes, will be sent to the CAIC, accompanied by a memorandum signed by the reviewing official. The revised evaluation will also be sent to the A-E firm and included in the A-E contract file. The CAIC will make the requested changes.

(3) An evaluation may be updated to change factual information (such as Items 9, 10 or 11) or correct obvious clerical errors without the approval of the reviewing official. A copy of the evaluation will be marked-up to show the changes and sent to the CAIC. The updated or corrected evaluation will also be sent to the A-E firm and included in the A-E contract file. The CAIC will make the requested changes.

6-10. Marginal and Unsatisfactory Performance.

a. General. This section implements FAR and EFARS 36.604(a)(4).

b. Documentation. Documentation of marginal or unsatisfactory performance must be

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adequate to support the performance rating. It is very important to document the steps taken by the Government to get the A-E firm to improve performance (see paragraph 5-9), and the A-E firm's responses. Records should be made of all telephone conversations and meetings with the A-E firm concerning performance. Generally, a final "marginal" or "unsatisfactory evaluation" should have been preceded by an interim "marginal" or "unsatisfactory" evaluation.

c. Preparation and Notification.

(1) A performance evaluation will be prepared documenting the marginal or unsatisfactory performance, but not signed by the rating and reviewing officials. A summary of the deficiencies will be given in Item 20, "Remarks." The KO will send a letter to the A-E firm notifying it of the intended rating and enclosing the proposed evaluation and supporting documentation.

(2) The A-E firm will be advised in the letter that it has 30 days from receipt of the letter to rebut the rating. The A-E firm will be advised of its right to have comments entered in Item 20, "Remarks," of the evaluation form in accordance with FAR 36.604(a)(4). If the A-E firm does not respond in writing within the allotted time, the evaluation will be finalized and distributed.

d. Rebuttal Process.

(1) If an A-E firm rebuts a rating, a meeting will be scheduled with the District Commander or Deputy District Commander. The firm will be advised of the fact-finding nature of this meeting and provided with the evidence that will be submitted to the Commander for consideration. Every effort will be made to fully explore the major performance deficiencies in the meeting to enable the Commander to make a decision without the need for additional meetings or evidence. The firm will be given sufficient time to prepare for this meeting. The meeting with the Commander will be held within 30 days of the firm's rebuttal letter, to the maximum extent possible.

(2) Following the meeting with the A-E firm, the Commander will decide whether to support or change the proposed rating. If the Commander decides to change the rating, the contract file will be documented to show the reason(s). If the firm has submitted any written comments, they will be added to Item 20, "Remarks." The evaluation will be signed by the rating official, and the Commander shall sign as the reviewing official.

(3) The KO will send a letter to the A-E firm advising of the Commander's decision and enclosing the signed evaluation. If the rating is "marginal," the letter will notify the firm that the decision is final. If the rating is "unsatisfactory," the firm will be advised that it can further rebut the evaluation to the MSC Commander, and, if so, that it must respond within 15 days of the date of receipt of the letter.

(4) If a firm rebuts an "unsatisfactory" rating, the MSC Commander will be briefed prior to the meeting with the A-E firm. The meeting between the MSC Commander and the

A-E firm will be held within 30 days of the meeting with the District Commander, to the maximum extent possible.

(5) The MSC Commander will decide whether to support or change the "unsatisfactory" rating assigned by the District Commander. If the MSC Commander decides not to change the rating, the contract file will be documented to show the reason(s). The KO will send a letter to the A-E firm advising of the MSC Commander's decision and that the "unsatisfactory" evaluation is final.

(6) If the MSC Commander decides that the "unsatisfactory" rating should be changed, the performance evaluation will be revised and signed by the rating official. The MSC Commander will sign as the reviewing official. The KO will send a letter to the A-E firm with a copy of the final revised evaluation.

(7) For Centers, the role of the District Commander will be filled by the highest level person in the engineering functional area. Rebuttals of a "unsatisfactory" rating are made to the Center Commander.

(8) Performance evaluations that are rebutted by A-E firms will not be transmitted to ACASS until the above rebuttal process is completed (EFARS 36.604(a)(4)).

CHAPTER 7

A-E RESPONSIBILITY MANAGEMENT PROGRAM

7-1. Introduction. This chapter addresses actions to be taken from the discovery of an A-E error or deficiency to the issuance of a final contracting officer's decision (COD) against the A-E firm under FAR 52.233-1, the contract "Disputes" clause. Subsequent action is covered by FAR 33.2, Disputes and Appeals.

7-2. Principles.

a. An A-E firm is responsible for the quality of its products and services and is liable for damages to the Government caused by its negligence or breach of contractual duty. The A-E Responsibility Management Program (AERMP) is a formal process for holding A-E firms accountable for their work and recovering damages to the Government caused by A-E firms.

b. The goals of the AERMP are to:

(1) Maintain and improve the quality of A-E services and products.

(2) Hold A-E firms responsible for their work and recover damages to the Government resulting from negligence or breach of contractual duty.

c. The AERMP will be conducted in a fair, consistent, and reasonable manner.

d. No demand for recovery of damages will be made to an A-E firm without an adequate review of the facts and circumstances.

e. Investigations and recovery actions will be pursued in a cost-effective and timely manner to mitigate damages, minimize administrative costs, strengthen the likelihood for full recovery, and allow the reuse of project funds.

f. Recovery of damages will only be pursued when economically justified or otherwise in the best interest of the Government.

g. A reasonable effort will be made to resolve liability actions through partnering and negotiation. If unsuccessful, other alternative dispute resolution (ADR) techniques should be considered. Litigation should be the last option.

h. Only the KO can accept a liability settlement for the Government or relieve an A-E firm of its liability.

7-3. Responsibilities.

a. MSC. MSC commanders are responsible for overseeing the AERMP in their subordinate districts to ensure timeliness, cost-effectiveness, and compliance with this

pamphlet. MSC Commanders will appoint an MSC AERC. The AERC will provide day-to-day oversight of the AERMP, and be the point of contact with the districts and HQUSACE.

b. Operating Commands¹.

(1) A-E Responsibility Administrator (AERA). The Chief, or Assistant Chief, of Engineering (or comparable position) will be the AERA. The AERA is responsible for the timeliness, cost-effectiveness, reasonableness and fairness of the AERMP, and compliance with this pamphlet. The AERA will appoint a command AERC. The AERC will be a very experienced engineer or architect who has the training specified in paragraph 4-4.b of this pamphlet. The AERC will be responsible for the day-to-day management of the AERMP and be the point of contact for the program.

(2) A-E Responsibility Management Review Board (AERRB). The commander of each operating command will establish an AERRB to review deficiencies in A-E performance when requested by the AERC or the KO and advise on appropriate action. The AERA shall chair the AERRB and the voting members will include senior representatives from Construction, Programs and Project Management, Contracting and Counsel.

c. Multiple Responsible USACE Commands. When the project management, design and/or construction of a project are performed by different USACE commands, the USACE command having KO authority for the A-E contract ("design" command) will be responsible for the AERMP, including reporting. The "design" command is responsible for developing a memorandum of understanding with the "project management" and/or "construction" commands on how the requirements of this chapter will be met.

7-4. Legal and Regulatory Background.

a. All FP contracts and ID contracts with FP task orders for A-E services must incorporate FAR clause 52.236-23, "Responsibility of the Architect-Engineer Contractor," which stipulates that:

(1) The A-E firm shall be responsible for the professional quality, technical accuracy, and coordination of all designs, specifications, and other services it furnishes.

(2) The A-E firm shall, without additional compensation, correct or revise any errors or deficiencies in its work.

(3) The Government's review, approval or acceptance of the A-E services is not a waiver of any of the Government's rights.

(4) The A-E firm shall be and remain liable for all damages to the Government caused by its negligent performance.

¹ See definition in paragraph 2-2.a.

b. Typical examples of A-E liability are when, due to an A-E design error or deficiency, modification of an ongoing construction contract is required or there is a design-related failure after construction. An A-E firm may also be liable for Government damages arising from failure to design within the funding limitations (FAR 36.609-1 and 52.236-22) or to comply with the contract schedule or technical provisions. In all such instances, FAR 36.608 directs the KO to “consider the extent to which the architect-engineer contractor may be reasonably liable,” and to “enforce the liability and collect the amount due, if the recoverable cost will exceed the administrative cost involved or is otherwise in the Government’s interest.”

c. Each of the following three questions must be answered affirmatively for an A-E firm to be liable for damages:

(1) Did the firm make an error or omission?

(2) Did the error or omission result from the firm's negligence, or from a breach of contractual duty?

(3) Has the Government suffered damages as a result of the error or omission?

d. The following legal principles should be considered when deciding if an A-E firm is liable:

(1) Negligence. Negligence is the failure to meet the standard of reasonable care, skill and diligence that one in the A-E profession would ordinarily exercise under similar circumstances.

(2) Burden of Proof. In order for the Government to prevail in a claim against an A-E firm, it must be able to prove that the firm was negligent and that the error or omission by the A-E firm was the cause of the damages.

(3) Comparative Negligence. The doctrine of comparative negligence provides that the Government is not barred from any recovery of damages if it is also negligent, but that there will be an apportionment of damages or responsibility in proportion to the relative fault of the parties involved.

(4) Mitigation. The Government has a responsibility for minimizing damages resulting from an A-E firm's deficiencies. The firm must be notified promptly when a deficiency is discovered by the Government and provided a reasonable opportunity to correct its work.

(5) Government Assumption of Risk. An A-E firm may be relieved of responsibility for a design deficiency due to action by the Government, such as if the Government corrects the design deficiency without the concurrence of the A-E firm and the corrected design is the cause of a failure.

e. The Government is entitled to seek recovery of damages resulting from any type of negligence, non-performance, or breach of contract terms. It is not necessary that the deficiency be corrected for the Government to recover damages. It is only necessary to show that the Government has incurred damages, or will in the future (diminished value theory).

f. FAR 36.608 allows economic factors to be considered when deciding whether to initiate an A-E liability case. However, it may be in the Government's interest to initiate a case where the administrative costs could exceed the anticipated recovery, such as a small claim arising from a serious error that could have resulted in much larger monetary damages or personal injury. All the circumstances of each case must be considered when deciding whether to pursue A-E liability.

g. It is possible to be overly zealous in the pursuit of A-E liability. It is not in the Government's best interest to make claims for relatively small damages due to minor errors that would probably not support a claim of negligence before a board or court. This could lead to the A-E community regarding such claims as a cost of doing business with USACE, with attendant increases in price proposals, diminution of the Corps' professional image, and fewer firms willing to work for USACE.

7-5. Implementation.

a. Command Implementation. Each USACE command will issue written procedures implementing the AERMP in the command.

b. Installation Support. The USACE KO retains responsibility for certain aspects of the administration of A-E contracts awarded for use by Army installations, including the investigation and enforcement of liability and resolution of contract disputes. In accordance with paragraph 5-6.d, the USACE KO will provide written instructions to the installation regarding the AERMP, including notification of the A-E firm, obtaining a corrective design, funding, and preparation of damage statements and findings-of-fact.

c. Program Cost Effectiveness. The AERA will periodically review the cost-effectiveness of liability investigations and recovery actions to ensure that the technical and administrative effort is commensurate with the damages recovered. In particular, the AERA will review the Efficiency Ratio and Settlement Ratio, as defined and reported on ENG Form 4858A-R (see paragraph 7-9.b(1)), for each liability case.

d. Schedule. A-E liability cases must be pursued in a timely manner to mitigate the damages and strengthen the likelihood for full recovery. Also, since recoveries can be credited to the project if the appropriation is open, quick action is highly desirable if the damages are significant. The AERC will establish an appropriate schedule for each case (depending on dollar value, complexity, and other pertinent considerations), closely track the Government and A-E firm's actions, and follow-up with the appropriate parties when suspense dates are not met. The AERA will periodically review liability cases to ensure their

timely progress.

7-6. Funding.

a. The AERMP is a team effort. While Engineering Division is the lead in administration of this program, the PM, Contracting, Counsel, Construction Division, Resource Management (RM) and other team members must be continually involved. The PM will be kept apprised of A-E liability actions so the PM may control, allocate and/or obtain funds and keep the customer informed. Also, the AERC will coordinate with the PM and RM to keep the project account open until all A-E liability actions are resolved. This will facilitate funding of the costs to pursue recovery of damages, as well as allow crediting the appropriate account(s) with monies received in settlements.

b. The AERC will request that the PM take appropriate action to ensure that detailed project cost records are maintained for each A-E liability case, starting when it is apparent that a liability case will be initiated. These cost records must include all costs associated with investigation, deliberation and prosecution of the case, including support costs incurred by the Office Counsel such as for travel, expert witnesses, and deposition expenses. (Office of Counsel labor costs are funded as general and administrative overhead.)

c. General administration of the AERMP, such as AERRB meetings and reporting, will be funded by the respective departmental overhead accounts of the personnel involved.

d. Planning and design (P&D) funds for military construction (MILCON) projects, and appropriate project funds² for other types of projects, will be used to investigate and pursue A-E liability actions that occur during planning or design.

e. For a project under construction, the initial investigation and documentation of A-E liability and damages by Construction Division will be charged to the Supervision & Administration (S&A) account. Thereafter, project contingency funds will be used to investigate and pursue A-E liability. For MILCON projects, P&D funds can also be used³.

f. During the design or construction of a project, the AERC will request additional project funds from the PM when necessary to investigate or pursue A-E liability. The request will give an explanation of the design deficiencies and damages, breakdown of estimated

² Project funds mean the appropriation that funded the project, or succeeding appropriations in the rare case the appropriation ceases to be funded and the activity is funded from a different appropriations.

³ P&D funds for A-E liability action on MILCON projects must be requested from HQUSACE, ATTN: CEMP-M, on a case-by-case basis. The request must include the amount of P&D funds required, an updated ENG Form 4858A-R (Quarterly A-E Liability Case Report), and a discussion of the likelihood and estimated amount of recovery. CEMP-M will make a risk assessment in evaluating the funds request.

costs, discussion of likelihood of recovery and expected amount of recovery.

g. The PM will request additional funds from the customer, if warranted. The decision to request and expend project funds to pursue A-E liability will consider the amount of the damages, the likelihood of recovery, whether the settlement will be received in time to benefit the customer's project or program (see paragraph 7-7.n and Appendix DD, paragraph 3), and the customer's willingness to provide the funding. Where project funds are no longer available, the respective departmental or general and administrative overhead accounts of the personnel involved may be used to investigate and pursue A-E liability. Only the KO can finally decide not to pursue A-E liability (FAR 36.608) due to funding constraints.

7-7. Notification, Investigation and Recovery Procedures. Appendix BB is a graphic depiction of the A-E liability process. Each step is discussed below.

a. Notification and Corrective Design.

(1) The A-E firm will be promptly notified⁴ as soon as a design deficiency is discovered, requested to provide a corrective design,⁵ and informed that it may be financially liable. Initial notification should be made by telephone immediately and formal notification will be made soon after by letter. The AE/RE will also immediately coordinate directly with the Engineering Division and the PM on significant design deficiencies discovered during construction. All contacts with an A-E firm will be fully documented.

(2) Engineering Division will review the corrective design when appropriate, such as when significant structural or life safety features are involved. The Engineering Division review will be performed promptly to avoid or minimize construction contract delays.

b. Corrective Design by the Government. If the A-E firm is unresponsive or cannot furnish a corrective design within an acceptable time period, the Government may have to provide the redesign. (See ER 1110-1-8152 regarding documenting design changes.) If so, the firm will be formally notified of its liability for the redesign cost and be kept informed of the Government actions. The firm should be requested to concur in the corrective action taken by the Government or should sign a release. A statement shall be prepared for the contract file in accordance with FAR 36.609-2 if no action is taken against an A-E firm to recover redesign costs.

c. Implementation of Corrective Construction. An A-E firm shall not be permitted to perform construction required to correct design deficiencies by any means, including the use

⁴ Notification will be made by a person identified in the A-E contract, such as the AE/RE, COR or PM.

⁵ There are instances where obtaining a corrective design from an A-E firm may not be necessary, such as when the correction is obvious and simple or the damages are minimal. But see paragraph 7-4.d(4) regarding the Government assumption of risk. In such cases, notification is not required, however the A-E firm must still receive an information copy of the construction contract modification.

of its or the Government's contractors. If done, the Government is not in control of the work and can not ensure that the Government's requirements and interests are satisfied. The Government may invite the A-E firm, as an advisor, to attend negotiations with the construction contractor on changes due to A-E design deficiencies.

d. Documentation of Deficiency. The discovery of a design deficiency and the early actions taken by the Government will be promptly and adequately documented. Include a thorough description of the deficiency, record of contacts with the A-E firm and its responses, the persons involved, actions taken, potential witnesses, and photographs, when appropriate. The AE/RE will evaluate each design error or deficiency using the conditions in paragraph 7-4.c, determine if the firm is not liable or is potentially liable, and document the contract file accordingly. The AE/RE will forward all potential instances of A-E liability to the AERC for further investigation.

e. Determination of Damages. If an A-E firm is potentially liable for a design error or deficiency, the AE/RE will compute the initial estimate of damages. Damages are the additional costs that the Government has incurred, or will incur in the future, due to an A-E firm's design errors or performance deficiencies. Appendix CC provides detailed guidance on determining damages. The damages will be revised as needed.

f. Investigation of Liability. The AERC will coordinate the investigation of potential instances of A-E liability. The investigation will be conducted by qualified design professionals of the appropriate disciplines who are familiar with the scope of the A-E contract. These persons must be capable of serving as credible Government experts if a liability case is eventually litigated. The investigation will be documented in a findings-of-fact that will:

(1) Explicitly define the errors or omissions by the A-E firm, including specific references to drawings, specifications, design criteria, review comments, and other pertinent documents.

(2) List the applicable contract provisions and any subsequent direction or guidance that might bear on the question of responsibility.

(3) Give an opinion on the A-E firm's responsibility and negligence. If the investigation concludes that the A-E firm is not liable for damages, the AERC will document the findings-of-fact accordingly and forward to the AERRB for concurrence. The findings-of-fact will be included in the contract file.

g. Preparation of Case Document. If the investigation concludes that an A-E firm is liable (but see paragraph 7-7.j for small actions), the AERC will prepare a case document to include:

- (1) Project background and schedule.
- (2) Computation of damages.

- (3) Findings-of-fact on liability.
- (4) Summary of any other liability actions on the same contract.
- (5) A-E performance evaluation history, including the contract under review.
- (6) Statement on the support and cooperation which the A-E firm provided during construction.
- (7) Any comments or information provided by the A-E firm regarding its liability.
- (8) Recommended action.

h. Letter of Intent. After the case document is prepared, the AERC will send a letter to the A-E firm (with a copy to the PM and the design COR) indicating the AERC's intent to recommend formal review by the AERRB of the firm's liability for damages. The letter will include any documents supporting the Government's position and a detailed statement of damages. The firm will be invited to present information on its position and to negotiate a settlement. A liability case is initiated when the letter of intent is sent⁶. Interest is not assessable until, and if, a demand letter is issued by the KO. In some instances it may be appropriate to issue a demand letter at this stage (see paragraph 7-7.1(3)).

i. Negotiation by AERC. The AERC may directly negotiate a liability settlement with an A-E firm without first presenting the case to the AERRB and without the KO issuing a demand letter, if the AERC has been previously authorized to do so by the KO⁷. The AERC will then present the case and proposed settlement to the KO for approval, and to Counsel and any other appropriate offices (which may include the AERRB) for concurrence. The settlement will be reported in accordance with paragraph 7-9. If negotiation is unsuccessful, the AERC will present the case to the AERRB.

j. Small Errors or Deficiencies. If there are no compelling non-economic reasons, the consideration of small errors or deficiencies (typically below \$2,500 - \$5,000, depending on the size of the contract) may be deferred until the total number and/or total damages warrants recovery. The AERC will periodically review the deferred liability actions on each contract to see if aggregate recovery is warranted, and document these reviews. Any errors or deficiencies still held at the end of a construction contract that do not warrant recovery will be presented collectively to the KO for approval not to pursue, with the concurrence of any other appropriate offices. The decision not to pursue will be documented in the contract file as required by FAR 36.608.

⁶ If an A-E settlement is made without the need for a letter of intent, a case report will still be prepared and the amount of the settlement included in the annual AERMP report. See paragraph 7-7 for reporting requirements.

⁷ The KO may assign a contract specialist to the negotiation team with the AERC.

k. AERRB Review and KO Action. The AERRB will promptly review the cases referred to it by the AERC and recommend action to the KO. The KO will then decide whether to issue a demand letter or not pursue recovery. The case document will be placed in the A-E contract file, along with the minutes of the AERRB meeting and the KO's decision.

l. Demand Letter.

(1) The demand letter is an informal Government claim against the A-E firm. It notifies the A-E firm of the claim and provides an opportunity for resolution of the matter without resorting to the "Disputes" clause. The demand letter is prepared by the Office of Counsel, with factual and technical input from the Engineering and Construction Divisions and the PM, and shall be signed by the KO.

(2) The demand letter shall include the charge of negligence or contract breach, with the supporting documentation, a detailed listing of the damages, and the A-E firm's options. The letter shall state that interest charges will accrue on the damages if the claim is not settled within 30 days (FAR 32.614-1), and that the damages will be adjusted for costs incurred by the Government subsequent to the demand letter. The letter shall also state that a COD will be issued if satisfactory progress towards resolution is not made within a specified period of time (typically 30-60 days).

(3) Consider when the demand letter should be issued on a case-by-case basis. For example, if the A-E liability is obvious and the damages are significant, a demand letter should be sent as soon as the AERC prepares the case document instead of sending a letter of intent. The interest clause in the contract (FAR 52.232-17) allows for interest from the date of the first written demand by the KO. (See Hazen & Sawyer, Inc., 85-1 BCA 17,919, which established the right of the Government to interest on recoveries under the A-E Responsibility clause. Also see 94-2 BCA 26,631, and 94-3 BCA 26,992.)

m. Negotiation and COD.

(1) A reasonable effort will be made to resolve a liability case by negotiation. If negotiation is not successful, consider using other ADR techniques⁸. If a firm does not respond to a demand letter in a reasonable length of time, the firm should be contacted and encouraged to either take issue with the Government's charges or enter into negotiations.

(2) If the firm still does not respond, a COD will be issued without delay. The COD starts a defined process under the "Disputes" clause. (See EFARS Appendix A, Part 3, A3-203.) The firm must either concede the case or appeal to the appropriate board of contract appeals within 90 days or the Court of Federal Claims within one year. The COD formally

⁸ ADR is a range of techniques for the efficient and effective management of disputes without litigation. See FAR 33.214. The techniques include collaborative problem solving, mediation, facilitation, and third party intervention. ADR can be very useful in resolution of disputes before issuance of a COD, as well as afterwards.

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notifies the A-E firm that the Government is making a claim for the reasons stated, gives a detailed statement of damages, and lists the firm's options. The Debt Collection Act of 1982 applies to a claim against an A-E firm when a COD is issued. See Appendix DD for applicable procedures.

(3) Primary responsibility for a case passes from Engineering Division to Office of Counsel if a COD must be issued. Counsel prepares the COD based on data provided by Engineering, Construction and Contracting Divisions. The COD must be fully coordinated in accordance with command procedures. Engineering Division remains responsible for monitoring the progress of the case, coordinating support, and reporting.

(4) The 6-year limitation on initiation of a Government claim in FAR 33.206(b) is applicable to A-E liability cases. The 6-year period begins on the date the A-E firm submits its completed work.

n. Settlement. A liability case is closed when final payment is received from the A-E firm or the KO sends a letter to the firm advising that the Government is dropping its claim. The A-E contract file shall be properly documented (FAR 36.608) upon settlement of a liability case to show the amount received and how the funds were dispersed. If the amount of the settlement is less than the amount of the assessed damages, the rationale for accepting the reduced amount must be documented. Appendix DD discusses settlement options and the disposition of the monies received in settlements.

7-8. A-E Performance Evaluation and Contract Closeout.

a. Liability arising during design is reflected on the A-E performance evaluation prepared after completion of design. Similarly, liability related to construction is reflected on the A-E construction performance evaluation. A revised evaluation will be submitted if a liability case is settled after the final performance evaluation has been prepared.

b. It may be convenient for Engineering Division to combine the review of the construction A-E performance evaluation with the "wrap-up" review of the A-E firm's design deficiencies after completion of construction. The AE/RE should be contacted to find out whether there are construction problems attributable to design deficiencies that have not been corrected by construction changes.

c. An A-E contract shall not be closed out until the firm's performance has been evaluated and all liability actions have been resolved. However, closeout of an A-E contract or a construction contract based on an A-E firm's design does not affect the Government's right to pursue the recovery of damages resulting from performance deficiencies which later become apparent (see paragraph 7-7.m(4)).

7-9. Reporting.

a. Customer. Customers and partners will be regularly apprised of the status of A-E liability actions on their projects.

b. District Reports.

(1) Quarterly. Districts will submit a quarterly report to their MSC (with a copy to Project Management, Construction, Contracting, Counsel and other concerned offices) on the status of all A-E liability cases within 30 days after the end of each fiscal quarter. The report will be prepared on ENG Form 4858A-R, Quarterly A-E Liability Case Report (Appendix EE). All settlements will be reported, no matter how they were reached. If there are no pending A-E liability cases, a letter or electronic message stating this fact will be submitted in lieu of this report.

(2) Annual. USACE operating commands will submit an annual report to their MSC on the status of their AERMP by 31 October. The report will be prepared on ENG Form 4858-R, Annual A-E Responsibility Management Program Report (Appendix EE).

c. MSC Reports. MSCs will submit an annual report to HQUSACE, ATTN: CEMP-EC, by 30 November, consisting of:

(1) A brief cover memorandum summarizing the status and effectiveness of their AERMP.

(2) The annual ENG Form 4858-R for each subordinate command.